IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

MATTHEW J JONES
Claimant

MENARD INC
Employer

APPEAL NO. 09A-UI-02740-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/04/09
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 730.5 – Private sector drug-free workplaces

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the February 10, 2009, reference 03, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on March 17, 2009. Claimant participated with his mother, Deb Jones, and was represented by David Stein, Jr., Attorney at Law. Employer participated through Stacy Trussoni, Troy Franke and Kent McCormick and was represented by Jason Kuiper, Attorney at Law. Employer's Exhibit 5 was admitted to the record. Employer declined to offer other exhibits.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked full-time as a production worker and was employed from March 31, 2008 until December 3, 2008 when he was discharged. He was involved in a workplace accident on November 24, 2008 and a urinalysis drug screen was administered the same day when he sought medical treatment for the injury. At no point during his employment was he provided with a copy of the employer's drug free workplace policy. Employer provided claimant notice of the December 2, 2008 positive drug screen by certified mail on January 13, 2009. Trussoni explained that the February 12, 2009 date on the notification letter in the exhibit is the printing date since employer did not keep a hard copy at the time it was mailed. Since he had moved in late November 2008 he had provided employer with his new address on the accident report forms he completed in the presence of his mother on December 1, 2008 but did not submit a separate payroll report change of address. Because the employer sent the test results and notice of the option to pay for a split sample within seven calendar days of the January 13, 2009 postmarked mailing (not certified mail receipt) date to the payroll address, rather than the address on the accident report form, claimant did not receive the results until February 2, 2009. Employer's policy provides that the sample is maintained for 45 days from the date of the positive test result, in this case, December 2, 2008. On

February 11, 2009 claimant asked Trussoni to submit a new sample. She declined the request as having been made too late. He had delayed because the language in the notification letter made him believe the request would have been tardy even on the day he received the letter.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
>
> a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

The employer has the burden of proving disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982).

Iowa Code § 730.5 allows drug testing of an employee if, among other conditions, the employer has "probable cause to believe that an employee's faculties are impaired on the job." Upon a positive drug screen, Iowa Code § 730.5(3)(f) requires that an employer offer substance abuse evaluation and treatment to an employee the first time the employee has a positive drug test. Iowa Code § 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing. Iowa Code § 730.5(7)(i)(1) mandates that an employer, upon a confirmed positive drug or alcohol test by a certified laboratory, notify the employee of the test results by certified mail *and the right to obtain a confirmatory test before taking disciplinary action against an employee*. Upon a positive drug screen, Iowa Code § 730.5(9)(g) requires, under certain

circumstances, that an employer offer substance abuse evaluation and treatment to an employee the first time the employee has a positive drug test. The Iowa Supreme Court has held that an employer may not "benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." *Eaton v. Iowa Employment Appeal Board*, 602 N.W.2d 553, 557, 558 (Iowa 1999).

The employer's delay in mailing the notice from December 2, 2008 until January 13, 2009 was unreasonable since, according to employer's policy, the split sample would have been destroyed on January 15, 2009, 45 days after the December 2 positive test result, and two days after the certified mail was sent on January 13, 2009. Even had claimant responded the day the certified mail was received explaining how to ask for a split sample, the sample would not have been available to test. Although claimant did not provide employer's payroll department with a change of address, the accident form for which the drug screen was initiated did contain his current mailing address. Even had employer mailed the notice to claimant's correct address on January 13, 2009 the sample would have been destroyed two days later according to employer's policy and five days before the employer's arbitrary deadline for requesting a split sample. Thus, since employer failed to provide a written copy of the drug testing policy to the claimant, failed to give him timely notice of the test results according to the strict and explicit statutory requirements, and failed to allow him an opportunity for another test since the split sample had been destroyed by the time he received the notice, the employer cannot use the results of the drug screen as a basis for disqualification from benefits. Benefits are allowed.

DECISION:

The February 10, 2009, reference 03, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs