

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHRISTINA DEMOSS
Claimant

APPEAL NO: 13A-UI-09846-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SEVENTH AVENUE INC
Employer

OC: 07/28/13
Claimant: Appellant (1)

Iowa Code § 96.5-2-a - Discharge for Misconduct

STATEMENT OF THE CASE:

Christina DeMoss (claimant) appealed an unemployment insurance decision dated August 16, 2013, reference 01, which held that she was not eligible for unemployment insurance benefits because she was discharged from Seventh Avenue, Inc. (employer) for The issue is whether the claimant was discharged for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 1, 2013. The claimant participated in the hearing. The employer participated through Lynn Mathison, Human Resources Assistant Manager. Employer's Exhibits One through Eight were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-related misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired as a temporary full-time lead at the employer's facility in Savanna, Illinois on July 20, 2005 and transferred to the Clinton, Iowa facility on July 6, 2009. She needed to transfer back to Savanna because she was convicted of driving under the influence of alcohol and lost her privileges to drive in the state of Iowa. The employer found a position for her but she had to take a drug test before transferring. The employer has a written drug policy that informs employees of the drug testing procedures and for which drugs the employer will be testing. The claimant was sent for a drug test on July 12, 2013 but could not provide an adequate urine sample so had to return on July 15, 2013.

The claimant tested positive for marijuana from a drug test that was taken at Healthworks in Savanna, Illinois on July 15, 2013. The Medical Review Officer Dr. Rick Tovar received the positive result and contacted the claimant by telephone on July 20, 2013 but she was unable to provide a legitimate medical explanation for the result so he released it as positive. The employer was notified on July 22, 2013 and the claimant was informed of the positive drug test and removed from work. The employer received a copy of the drug test on July 30, 2013, and contacted the claimant again by telephone to discuss it with her. The employer sent the

claimant a written letter on that same date by certified mail, return receipt requested, which notified her of her termination. The letter informed her of her right to a second confirmatory test and provided the applicable instructions. The claimant had a right to appeal her termination according to company policy and this right was also addressed in the termination letter. The claimant did not elect to appeal the termination nor did she go forward with a confirmatory test of the split sample.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for violation of the employer's drug and alcohol policy due to her positive drug test for marijuana. Iowa Code §730.5 sets forth the rules by which a private company may screen its employees for use

of illegal drugs. In order for a violation of an employer's drug or alcohol policy to be disqualifying misconduct, it must be based on a drug test performed in compliance with Iowa's drug testing laws. *Eaton v. Iowa Employment Appeal Board*, 602 N.W.2d 553, 558 (Iowa 1999).

The employer has a written drug testing policy per Iowa Code § 730.5(9)(b) and tested the claimant on a random basis. The claimant was advised of the drugs to be tested and was given the opportunity to advise the medical review officer of any drugs she was taking that might have affected the outcome. Iowa Code § 730.5(7)(c)(2). The test was performed during the workday at a medical office and split samples were taken at the time of collection. Iowa Code §§ 730.5(6) and (7)(a-c). A medical review officer reviewed and interpreted the confirmed positive test result and notified the claimant of the positive results before reporting the results to the employer; Iowa Code § 730.5(7)(g).

The claimant was notified by regular mail and by certified mail, return receipt requested of the positive result and her right to obtain a confirmatory test of the secondary sample. Iowa Code § 730.5(7)(i)(1) and (2). The employer has met the requirements of Iowa Code § 730.5. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

DECISION:

The unemployment insurance decision dated August 16, 2013, reference 01, is affirmed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs