

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MATTHEW L REGAN
Claimant

AADG INC
Employer

APPEAL 23A-UI-08905-PT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/27/23
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer filed an appeal from the unemployment insurance decision dated September 14, 2023, (reference 01) that allowed benefits after a separation from employment. After due notice, a telephone hearing was held on October 3, 2023. The claimant did not participate. The employer participated through Senior Human Resources Generalist Amy Schmitt. The administrative law judge took official notice of the administrative record.

ISSUES:

Did the employer discharge the claimant for job related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began his employment on October 7, 2019, as a team lead worker. Claimant worked full-time day shift hours. Claimant's last day physically working on the job was July 19, 2023. The employer discharged claimant on August 23, 2023.

On July 19, 2023, it was reported to claimant's supervisor that claimant smelled like marijuana. Claimant's supervisor met with claimant and agreed that claimant smelled like marijuana. A human resources representative escorted claimant to a restroom for claimant to take a urinalysis drug test. Claimant provided a sufficient sample. The HR representative split the sample into two samples and sent the first sample to a certified laboratory for testing.

Sometime in mid-August, a medical review officer contacted the employer and informed the employer that claimant's test was positive for marijuana and amphetamine. The employer mailed claimant a letter stating that the drug screen was positive for marijuana and amphetamine and that the employer was terminating claimant's employment for violating the employer's drug and alcohol policy. The letter also provided the contact information for the medical review officer and advised the claimant that he could request a confirmatory test at his expense from a laboratory of his choice within seven days of the notification. The letter did not specify a dollar figure for the cost of the test. The claimant did not request a confirmatory test of the second sample.

The employer has a written policy against the use of drugs and being under the influence of illegal drugs at work. The claimant may have received a copy of the policy; however, at the hearing, the employer did not offer a copy of the drug policy or an acknowledgement of receipt into evidence. The employer's drug policy purports to state that the employer has the right to test employees based upon the employer's reasonable suspicion that an employee is under the influence of illegal substances. Moreover, the employer did not offer a copy of the drug test into evidence; however, the employer's witness, Senior HR Generalist Amy Schmitt, testified that the claimant tested positive for THC and amphetamine.

Claimant's administrative record reflects that claimant filed his original claim for benefits with an effective date of August 27, 2023. Since filing his initial claim, claimant has filed no weekly claims and has received no unemployment insurance benefits. The employer did not participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

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

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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

Testing under Iowa Code section 730.5(4) allows employers to test employees for drugs and/or alcohol but requires the employer "adhere to the requirements . . . concerning the conduct of such testing and the use and disposition of the results." Iowa Code section 730.5(1)*i* allows drug testing of an employee upon "reasonable suspicion" that an employee's faculties are impaired on the job or on an unannounced random basis. It also allows testing as condition of continued employment or hiring. Iowa Code § 730.5(4).

Testing shall include confirmation of initial positive test results. Iowa Code section 730.5(7)(i)(1) mandates certain action after a medical review officer (MRO) reports a positive test result to the employer, upon a confirmed positive drug test by a certified laboratory. After such a positive test report, the employer must notify the employee both of the test results by certified mail return receipt requested, and of the right to obtain a confirmatory or split-sample test before taking disciplinary action against an employee. Iowa Code section 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing.

In *Woods v. Charles Gabus Ford, Inc.*, 942 N.W.2d 7 (Iowa 2021), the Iowa Supreme Court held that the employer's failure to include information regarding the specific cost of a retest in the result letter rendered the employer's compliance with the other requirements of Iowa Law for drug testing insufficient to demonstrate misconduct. The Court went on to say, "Without knowing the cost of a retest, a person does not have a meaningful opportunity to consider whether to undertake a confirmatory test... [The employer] failed to substantially comply with the statute by failing to include the cost of a retest in the letter." *Id.*

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 Emp't Appeal Bd.*, 602 N.W.2d 553, 557, 558 (Iowa 1999).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A violation is not

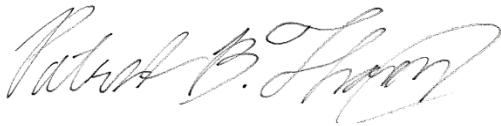
necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

In this case, the letter the employer mailed informing claimant of the positive drug test and his right to request a confirmatory test failed to inform claimant of the cost of a retest. As the Iowa Supreme Court held in *Woods*, “without knowing the cost of a retest, a person does not have a meaningful opportunity to consider whether to undertake a confirmatory test.” 962 N.W.2d at 8. As such, while the employer certainly may have been within its rights to test and fire the claimant, it failed to provide claimant a meaningful opportunity to consider whether to undertake a confirmatory test in accordance with the strict and explicit statutory requirements. As such, the employer cannot use the results of the drug screen as a basis for disqualification from benefits. The separation from employment with this employer is not disqualifying and benefits are allowed, provided claimant is otherwise eligible.

Because claimant’s separation was not disqualifying, the issues of overpayment, repayment and chargeability are moot.

DECISION:

The September 14, 2023, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from the employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. The issues of overpayment, repayment and chargeability are moot.



Patrick B. Thomas
Administrative Law Judge

October 9, 2023
Decision Dated and Mailed

pbt/scn

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. *There is no filing fee to file an appeal with the Employment Appeal Board.*

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may file a petition for judicial review in district court.

2. If you do not file an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at www.iowacourts.gov/efile. *There may be a filing fee to file the petition in District Court.*

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal. *No hay tarifa de presentación para presentar una apelación ante la Junta de Apelación de Empleo.*

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si no presenta una apelación de la decisión del juez ante la Junta de Apelación de Empleo dentro de los quince (15) días, la decisión se convierte en una acción final de la agencia y tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días. Puede encontrar información adicional sobre cómo presentar una petición en www.iowacourts.gov/efile. *Puede haber una tarifa de presentación para presentar la petición en el Tribunal de Distrito.*

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.