

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LARRY S UNGER
Claimant

APPEAL NO. 13A-UI-09094-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CCB PACKAGING INC
Employer

OC: 07/14/13
Claimant: Respondent (1)

Section 96.5-2-a – Discharge
Section 730.5 - Private Sector Drug Testing

STATEMENT OF THE CASE:

CCB Packaging, Inc. filed a timely appeal from a representative's decision dated August 1, 2013, reference 02, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on September 11, 2013. Although duly notified, the claimant did not participate. The employer participated by Ms. Michelle Azevedo, Human Resource Manager. Employer's Exhibits A and B were received into evidence.

ISSUE:

The issue is whether the evidence in the record establishes that the claimant was discharged for misconduct in connection with his employment.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Larry Unger began employment with CCB Packaging, Inc. on February 9, 2009. Mr. Unger was most recently employed as a full-time quality technician and was being paid by the hour. His immediate supervisor was Tina Kerns. Mr. Unger was discharged from his employment with CCB Packaging, Inc. on June 25, 2013 after testing positive for methamphetamine after being drug tested on June 19, 2013.

Mr. Unger was subject to re-testing under the provisions of the employer's drug policy because he had failed an initial drug test on March 26, 2013. The claimant had been suspended at that time and re-testing was part of the disciplinary action agreement. Under the agreement, the claimant was subject to random re-testing once per quarter and the claimant was aware that if he failed the testing he would be subject to discharge.

On June 19, 2013, the claimant's name was selected for random testing by a third party entity using a computerized selection process. The testing took place right after the claimant's work shift and took place in an authorized testing facility. The statutory requirements regarding the

chain of custody and split samples were complied with and the test sample was sent to a certified laboratory for re-testing. The positive test results for methamphetamine were confirmed by secondary testing.

Mr. Unger was contacted by the testing facility's medical review officer to determine if any other factors may have affected the test results. Subsequently, CCB Packaging, Inc. was informed of the positive test results for methamphetamine and Mr. Unger was informed of the positive test results by a letter that was sent for ordinary delivery by the U.S. Postal Service. The letter was not sent by certified mail with return required. The letter informed Mr. Unger of the positive test results but did not inform the claimant of his right to have the split sample maintained by the testing facility re-tested and the employer would pay for the re-testing if the results were negative. It appears that information about the right to request re-testing was contained in a letter given to Mr. Unger on the day of the testing but not included in the termination letter.

Subsequently, Mr. Unger disputed the positive test results in a conversation with Ms. Azevedo and Ms. Azevedo conferred with the medical review officer about whether additional factors would have skewed the test results. The medical review officer indicated to Ms. Azevedo that they would not have. Mr. Unger appears to not have requested a re-testing of the split sample that had been reserved by the testing facility for that purpose.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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 proof in establishing job disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating the claimant but whether the claimant is entitled to unemployment insurance benefits. Infante v. Iowa Department of Job Service, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants the denial unemployment insurance benefits are two separate decisions. Pierce v. Iowa Department of Job Service, 425 N.W.2d 679 (Iowa App. 1988).

Iowa Code section 730.5 provides the authority under which a private sector employer doing business in Iowa may conduct drug or alcohol testing of its employees. In Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553 (Iowa 1999), the Supreme Court of Iowa considered the statute and held "that an illegal drug test cannot provide a basis to render an employee ineligible for unemployment compensation benefits." Thereafter, in Harrison v. Iowa Employment Appeal Board, 659 NW 2d 581 (Iowa 2003), the Iowa Supreme Court held that where an employer had not complied with the statutory requirements for the drug test, the test could not serve as a basis for disqualifying a claimant for benefits. In the present case, the testing of Mr. Unger was reasonable based upon his previous failure to pass a drug screening test and the agreement that Mr. Unger would undergo random drug testing each quarter to ensure that he was complying with the provisions of the previous disciplinary action. The method of selecting the claimant for testing was in compliance with the law. The time of the testing, location, chain of custody and split sample also were in compliance with section 730.5 of the Iowa drug testing statute. The claimant was also properly contacted by the testing facility's medical review officer to determine if any other factors had affected the claimant's positive test results and a split sample was retained for re-testing, if requested by the claimant.

The method of notification to the claimant of the positive test result, however, were not in conformity to section 730.5-i(1) of the Iowa drug testing statute. That portion of the Iowa drug testing statute requires that the employer shall notify the employee of positive test results in writing by certified mail, return receipt requested, of the results of the test, the employee's right to re-test and obtain a confirmatory test of the second sample at a laboratory of the employee's choice and the fee payable by the employee to the employer for reimbursement of expenses concerning the re-testing and that if the results of the second test do not confirm the results of initial confirmatory tests, the employer will reimburse the employee for the fee paid for the second test.

Because the employer's drug testing policies and procedures did not comply with Iowa Code section 730.5, the test was not authorized by law and cannot serve as a basis for disqualifying Mr. Unger for unemployment insurance benefits. Based upon the evidence in the record and the application of the appropriate law, the administrative law judge concludes that Mr. Unger was discharged under non disqualifying conditions. Accordingly, he is eligible for unemployment insurance benefits, providing that he meets all other eligibility requirements of Iowa law. The employer's account may be charged for benefits paid to Mr. Unger.

DECISION:

The representative's decision dated August 1, 2013, reference 02, is affirmed. The claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs