

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JUSTIN J HOLDER**

Claimant

**APPEAL NO. 12A-UI-03703-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SWIFT PORK COMPANY**

Employer

**OC: 01/22/12**

**Claimant: Appellant (2)**

Section 96.5-2-A – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The claimant filed an appeal from a decision of a representative dated February 27, 2012, reference 01, which held that the claimant was not eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on April 25, 2012. Claimant participated. Harlan Siemens was a witness for the claimant. The employer participated by Aureliano Diaz, the human resources manager. The record consists of the testimony of Aureliano Diaz; the testimony of Justin Holder; and the testimony of Harlan Siemens.

**ISSUE:**

Whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a food processing plant located in Marshalltown, Iowa. The claimant was hired on October 13, 2008, as a maintenance employee for boilers and engines. He was a full-time employee. His last day of work was January 2, 2012. He was terminated on January 6, 2012.

The incident that led to the claimant's termination occurred on January 2, 2012. The claimant and another employee, Harlan Siemens, were in the small engine room discussing a problem with some boiler heaters. A supervisor came by and saw smoke coming out of a trash bin. The supervisor looked at the trash bin and saw a device that was smoking. The device was believed to be a water pipe.

The claimant and Mr. Siemens were first escorted from the engine room and then sent home on suspension. The employer asked them to each give a urinalysis on January 3, 2012. Both tests were positive for methamphetamine. The employer discharged the claimant and Mr. Siemens for using an illegal substance while on company property.

## 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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. The employer has the burden of proof to establish misconduct.

Although the employer insisted that the claimant was discharged for engaging in illegal acts, the illegal act in question was the use of illegal drugs while on company property. A supervisor noticed that a room where the claimant and another employee were standing was smoke filled and he discovered a water pipe that was still smoking in a garbage can. The claimant denied having used the water pipe or that he was engaged in any kind of drug use. The employer decided to have each employee undergo a drug test and the claimant's test was positive for methamphetamine. When asked if the claimant would have been discharged had the test been

negative, the employer said no. The administrative law judge concludes that the positive drug test was indeed the crucial piece of evidence that led to the decision to terminate the claimant. No one actually witnessed the claimant using drugs and both the claimant and Mr. Siemens denied they were using drugs when found in the smoky room.

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 employees. In Eaton v. 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. Employment Appeal Board, 659 N.W.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 Sims v. NCI Holding Corp., 759 N.W. 2d 333, 338 (Iowa 2009), the court held that substantial compliance with the statute was required before a drug test request or drug test may serve as a basis for disqualifying an employee for unemployment insurance benefits.

The employer did not substantially comply with Iowa Code section 730.5. Assuming arguendo that the employer could establish reasonable suspicion for the drug test, every other provision of 730.5 was ignored. The claimant did not have an opportunity to speak with an MRO prior to the test results being given to the employer. There was no split sample and no opportunity given to the claimant for a split sample testing. The claimant was not notified by certified letter about the results of his drug test. An employer cannot circumvent the requirements of section 730.5 by saying that the drug test had nothing to do with the termination when the basis for the termination was the use of illegal drugs. The employer ordered the drug test in order to confirm its suspicions and the drug test clearly played a role in the claimant's termination.

Because the employer did not comply with Iowa Code section 730.5 the claimant's termination is not misconduct that disqualifies him from receiving unemployment insurance benefits. Benefits are allowed if the claimant is otherwise eligible.

#### **DECISION:**

The decision of the representative dated February 27, 2012, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

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