IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

TIMOTHY J HOVAR Claimant **BRUNS MACHINE** Employer	**APPEAL 16A-UI-07419-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/12/16** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the July 1, 2016 (reference 01) unemployment insurance decision that denied benefits based upon his discharge from employment for job related misconduct. The parties were properly notified of the hearing. A telephone hearing was held on July 25, 2016. The claimant, Timothy J. Hovar, participated personally. The employer, Bruns Machine, participated through Controller Timothy Donat. Employer's Exhibits 1 and 2 were admitted.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a machine operator. Claimant's job duties included operating various machines in the plant. Claimant was employed from June 11, 1998 until June 14, 2016. Claimant was discharged for violation of the employer's drug and alcohol policy.

The employer does have a written drug and alcohol policy and procedure. See Exhibit 1. The claimant did receive a copy of this policy. See Exhibit 1.

The claimant was involved in an accident at work resulting in injury to claimant. The claimant was asked to submit to a drug test under the employer's reasonable suspicion policy. See Exhibit 1.

The policy provides for uniform disciplinary or rehabilitative actions upon a confirmed positive test result or a refusal to provide a sample for testing. See Exhibit 1. These disciplinary actions include but are not limited to discharge from employment. See Exhibit 1.

The employer has an awareness program regarding the dangers of drug and alcohol use in the workplace. The employer requires supervisory personnel who are involved in alcohol or drug testing to attend a minimum of two hours of initial training and a minimum of one hour of subsequent training each year to inform them about the signs of drug and alcohol abuse.

The claimant was notified that the test was being given when he arrived at Allen Memorial Hospital and was treated for his injury. The sample tested was urine. The sample collected was not directly monitored when collected. The sample was split into two components at the time of collection and in the presence of the claimant. The first sample was a confirmed positive test result for marijuana. The claimant was provided an opportunity to disclose any information which may be considered relevant to the test, including prescription information he was taking at the time. The testing was done at a certified laboratory.

The employer's drug and alcohol policy states that if an employee tests positive for illegal drugs then they can be subject to discharge from employment. See Exhibit 1. Claimant was informed on June 14, 2016 by a person at Allen Memorial Hospital that the test was confirmed positive for marijuana. Claimant was also told by the person who telephoned him from Allen Memorial Hospital that the cost to perform a second test would be $150.00 to $250.00.

Claimant was discharged by the employer on this same date. Claimant was hand-delivered a letter from the employer on this date about his rights to request a second confirmatory test. The letter did not include the price of the second test which would be payable to the employer but stated that claimant could use a facility of his own choosing. Claimant does not remember seeing this letter. Claimant received several documents in a large packet when he was discharged from the employer.

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. Benefits are allowed.

As a preliminary matter, I find that Claimant did not quit. Claimant was discharged from employment.

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.

Iowa Admin. Code r.871-24.32(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.

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). 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. 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). A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. 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.

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). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.* When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be

disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986).

Iowa Code § 730.5 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). 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 return receipt requested***, and the right to obtain a confirmatory or split-sample test. (emphasis added).

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 conducting drug tests, [a]n employer shall adhere to the requirements of [section 730.5] concerning the conduct of such testing and the use and disposition of the results of such testing. *Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 338 (Iowa 2009)(citing Iowa Code § 730.5(4)). The question becomes whether or not the employer substantially complied with the written notice provisions of Iowa Code § 730.5. *Id*.

Iowa Code § 730.5(i)(1) states in part that:

> If a confirmed positive test result for drugs or alcohol for a current employee is reported to the employer by the medical review officer, the employer shall notify the employee in writing by certified mail, return receipt requested, of the results of the test, the employee's right to request and obtain a confirmatory test of the second sample collected pursuant to paragraph "b" at an approved laboratory of the employee's choice, and the fee payable by the employee to the employer for reimbursement of expenses concerning the test. The fee charged an employee shall be an amount that represents the costs associated with conducting the second confirmatory test, which shall be consistent with the employer's cost for conducting the initial confirmatory test on an employee's sample. If the employee, in person or by certified mail, return receipt requested, requests a second confirmatory test, identifies an approved laboratory to conduct the test, and pays the employer the fee for the test within seven days from the date the employer mails by certified mail, return receipt requested, the written notice to the employee of the employee's right to request a test, a second confirmatory test shall be conducted at the laboratory chosen by the employee.

In this case no letter was mailed to the claimant by certified mail, return receipt requested of his rights under Iowa Code § 730.5, rather, a letter was hand delivered to him at the time he was being discharged from employment. Further, the letter did not state what amount fee would be payable by the employee to the employer for reimbursement of expenses concerning a second test.

The reason that the statute requires the notice to be mailed by certified mail, return receipt requested is to communicate to the employee that the notice is important. See *Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 338 (Iowa 2009)(citing *Harrison v. Employment Appeal Bd.*, 659 N.W.2d 581 (Iowa 2003)). In this case claimant was given the letter along with several other papers at the time that he was being discharged from employment. Discharge from employment can be a very emotional time for employees. Further, the fact that this letter was

placed with several other documents regarding claimant's discharge from employment does not convey that the information contained in the letter is important and that claimant should act quickly. The employer did not substantially comply with Iowa Code § 730.5 because the letter was not mailed by certified mail, return receipt requested and because the letter did not contain information regarding the amount which claimant would need to pay to the employer for reimbursement of expenses concerning the second test.

While the employer certainly may have been within its rights to test and discharge the claimant, it failed to provide him notice of the test results by certified mail return receipt requested as required by the statute and the costs to pay to the employer for reimbursement of expenses concerning the second test. Thus, the employer cannot use the results of the drug screen as a basis for disqualification from benefits.

As such, employer has failed to prove that claimant was discharged for any current act of job-related misconduct that would disqualify him from receiving benefits. Benefits are allowed.

DECISION:

The July 1, 2016 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Dawn R. Boucher
Administrative Law Judge

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Decision Dated and Mailed

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