**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**MARGARET M NEWCOMB**
Claimant

**MENARD INC**
Employer

**APPEAL NO: 10A-UI-09851-DT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 06/06/10**
**Claimant: Appellant (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Margaret M. Newcomb (claimant) appealed a representative's July 7, 2010 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Menard, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 25, 2010. The claimant participated in the hearing. Scott Walls, in-house attorney, appeared on the employer's behalf and presented testimony from two witnesses, Brian Sampson and Jessica Borwig. During the hearing, Claimant's Exhibit A was entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

Was the claimant discharged for work-connected misconduct?

**FINDINGS OF FACT:**

The claimant started working for the employer on June 3, 2004. She worked part time (25 – 30 hours per week) in sales at the employer's Waterloo, Iowa store. Her last day of work was June 11, 2010. The employer discharged her on that date. The stated reason for the discharge was having a positive drug test in violation of the employer's policies.

On June 2 the claimant received an injury while she was moving a cart of paneling at work in which she fell and hit her head on a concrete floor. She was transported to a hospital by ambulance and was treated for a concussion and a head laceration which required seven staples. While at the hospital she was informed she would need to provide a urine sample for drug testing under the employer's drug testing policy. The employer's written policy, of which the claimant was on notice, included provision for testing in cases of injuries reportable for purposes of occupational health regulations; the policy specifies the type of drugs for which a sample will be tested. The claimant provided the sample in a private hospital area, and observed and initialed the labeling of the containers, including a container for a split portion of the sample. The technician who obtained the samples inquired of the claimant if she had any medical conditions or medications that could affect the outcome of the test, to which she

responded there were not. She was then released from the hospital and was able to return to work after about a day.

The sample was forwarded to the employer's certified drug testing laboratory for processing. Initial and confirmatory testing on the sample by the laboratory indicated the presence of marijuana. As a result, the employer was informed on June 11 that the test had resulted in a positive drug test.

The employer summoned the claimant in for a discussion, at which time she was informed of the positive drug test result and informed that the employer would be discharging her. She was also advised she could have the split portion of the sample tested at her own expense, and if that test result was negative, she would be reinstated. The claimant denied that she had directly consumed marijuana, but acknowledged that she had been present while others had smoked marijuana.

Also on June 11 the employer sent a letter to the claimant by certified mail informing her that "the results of both the initial screening test and the confirmatory test of the sample . . . are positive." The letter further specified that the claimant had the "right to request, at your own expense, a confirmatory retest of the split sample of your original specimen at an approved laboratory of your choice. If you would like a confirmatory retest, you must indicate your decision to have a retest in writing within seven calendar (7) days of this letter's postmark date. The cost of the confirmatory retest is $150.00. . . . To request a retest, please put an "X" in the space provided in the enclosed Options Form, sign the Form and submit it to me within seven calendar days of this letter's postmark date. If the confirmatory retest does not confirm the original positive test, the Company will not take any adverse personnel action based on the original test and the cost of the confirmatory retest will be reimbursed to you." The original cost of the test to the employer had also been $150.00.

The claimant received the letter on June 17, 2010. She may have made an attempt to contact the letter's author by phone, but she did not make a written response and did not return the retest request form.

**REASONING AND CONCLUSIONS OF LAW:**

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. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

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 Eaton court said, "It would be contrary to the spirit of chapter 730 to allow an employer to benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." Eaton, 602 N.W.2d at 558. The employer's requirement that the claimant submit to post-accident testing was allowed under Iowa Code § 730.5. There was both initial and confirmatory testing performed on the primary sample prior to the announcement to the employer of the drug test results and the employer's termination of the claimant. The claimant was properly offered the opportunity to have the remaining split portion of the sample tested, but did not exercise that option. The employer substantially complied with the drug testing regulations. A preponderance of the evidence establishes the claimant violated the employer drug policy. The claimant's violation of the policy shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

**DECISION:**

The representative's July 7, 2010 decision (reference 01) is affirmed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of June 6, 2010, the effective date of her claim. This disqualification continues until the claimant has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs