

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ELLA L HARRINGTON
Claimant

APPEAL NO. 10A-UI-15810-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

DIAL SILVERCREST CORPORATION
Employer

**OC: 03/07/10
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Dial Silvercrest (employer) appealed a representative's November 9, 2010 decision (reference 02) that concluded Ella Harrington (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for December 28, 2010. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer participated by James Hunter, Executive Director.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on July 21, 2010 as a full-time aid/med manager. The claimant signed for receipt of the employer's handbook and separate Drug Policy on July 21, 2010. The employer received anonymous letters indicating the claimant was smoking marijuana on the employer's premises. It decided to have the claimant drug tested under a reasonable suspicion clause in the Drug Policy.

On October 1, 2010, the claimant finished her shift at 7:00 a.m. The claimant was told to return to the worksite after taking care of personal business. At approximately 10:45 a.m., the claimant returned to the worksite and the employer transported the claimant to the laboratory for urinalysis. On October 5, 2010, the employer received confirmation from the laboratory that the claimant tested positive for marijuana. The employer telephoned the claimant, told her the result of the test, and terminated her.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged for misconduct.

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 disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Iowa Code Section 730.5(1)(i) indicates that "reasonable suspicion drug or alcohol testing" must be based on evidence from a reliable and credible source. In this case the source was neither reliable or credible because it was anonymous. Iowa Code section 730.5(6)(a) indicates that testing shall occur during or immediately before or after a regular work period. The employer had the claimant tested four hours after the end of her work period rather than during or immediately following her shift. Iowa Code section 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 and the right to obtain a confirmatory test before taking disciplinary action against an employee. The employer did not send the results by certified mail or notify the claimant of her right to a confirmatory test prior to terminating her. 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 Employment Appeal Board, 602 N.W.2d at 558. The employer failed to follow the strict and explicit statutory requirements. Benefits are allowed.

DECISION:

The representative's November 9, 2010 decision (reference 02) is affirmed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/kjw