

**IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI**

**ROBIN D LOVELL  
9900 OPAL LN  
CEDAR FALLS IA 50613**

**OMEGA CABINETS  
1205 PETERS DR  
WATERLOO IA 50703**

**Appeal Number: 04A-UI-10418-S2T  
OC: 08/29/04 R: 03  
Claimant: Respondent (1)**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

**STATE CLEARLY**

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Omega Cabinets (employer) appealed a representative's September 21, 2004 decision (reference 01) that concluded Robin Lovell (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 held on October 18, 2004. The claimant participated personally. The employer participated by Chase Thornburgh, Human Resources Representative, and Keith Westemeier, Production Supervisor.

#### FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on May 6, 2004, as a full-time process technician. The claimant was told about the Drug Free Workplace and Substance Abuse Policy. A copy was available for her to look at in the Human Resources Office. At a meeting on July 7, 2004, the claimant spoke quickly, her speech was slurred, and she was unable to recall recent events.

The employer had the claimant submit to a reasonable suspicion test but did not inform the claimant of the drugs for which she would be tested. The claimant supplied a sample and the sample was split. The employer was unaware of the quantity of each sample. The claimant was not given the opportunity to provide information that might affect the test results.

The employer received the results of the testing and informed the claimant by letter dated July 14, 2004 she was terminated. On September 17, 2004, the employer sent the claimant a certified letter return receipt requested indicating she tested positive for amphetamines and she could request a confirmation test using the second sample. The claimant did not request a confirmation test because she had been terminated in July 2004.

#### REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes she was not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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). The claimant was terminated for violating the employer's drug policy. Iowa Code Section 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing. Iowa Code section 730.5(7)(c)(2) requires the employer to inform the employee of the drugs to be tested and gives the employee an opportunity to provide information that might affect the test results. 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 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 give the claimant a written copy of the employer's drug policy. It failed to give the claimant an opportunity to provide information that might affect the test results. It failed to inform the claimant of the drugs to be tested. Lastly, the employer failed to give the claimant notice of the test results according to the strict and explicit statutory requirements. The employer did not follow the requirements of the statute. Benefits are allowed.

DECISION:

The representative's September 21, 2004 decision (reference 01) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

bas/b