

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

OLIVER L LEWIS
Claimant

APPEAL NO: 18A-UI-07065-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

MASTERTSON PERSONNEL INC
Employer

OC: 10/15/17
Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 19, 2018, reference 04, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on July 19, 2018. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Jim Robertson, Unemployment Operations Manager and Chris Burks, Branch Manager, participated in the hearing on behalf of the employer. Employer's Exhibits One through Three were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time food packager for Mastertson Personnel, Inc. last assigned at Standard Distributing from March 8, 2018 to May 23, 2018. He was discharged for failing a drug test following a work injury.

The employer's drug and alcohol policy is in writing and the claimant was provided a copy and signed for it November 29, 2017 (Employer's Exhibits One and Two). The employer requires drug-tests of employees following a work injury. On May 23, 2018, the claimant cut his arm at work and his supervisor sent him to Allen Occupational Health for stitches. The employer contacted the claimant and notified him he needed to come into the office for a drug screen. The employer conducted a preliminary urine test and the results appeared to be positive for methamphetamine. The employer informed the claimant he needed to return to Allen Occupational Health for a more formal drug test. The employer testified it had never been to Allen Occupational Health and consequently did not know if the testing conditions are sanitary and private or whether the claimant's urine sample was split at the time of collection. The employer is not aware of whether the claimant was given the opportunity to provide any information to the medical review officer that might affect the test results and or whether he was informed of all of the drugs for which he would be tested. The employer notified the claimant by

phone June 4, 2018, that he tested positive for methamphetamine (Employer's Exhibit Three). After receiving the positive test results, the employer did not send the claimant a certified letter, return receipt requested, notifying him of his right to a confirmatory test at his expense. The claimant basically hung up on the employer when it notified him of the test results so the employer did not have the opportunity to tell the claimant that if he enrolled in a self-pay treatment program and provided proof of completion of the program he would be eligible for further assignment. The employer did tell the claimant he could not return to his current assignment.

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.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

The employer has the burden of proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). 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. Testing following a work-related injury is allowed. The evidence in the record clearly establishes that the employer did not meet all requirements of Iowa Code section 730.5. While the employer performed the test during the claimant's shift and paid the costs of the initial test, it is unclear whether it provided private and sanitary conditions for the test, split the samples at the time of the collection, gave the claimant an opportunity to provide any information that might affect the outcome of his test, or informed the claimant of which drugs would be tested. According to Employer's Exhibit Three, the confirmed positive testing was done by a certified laboratory before disciplinary action was taken. However, the employer did not notify the claimant of the test results by certified mail, return receipt requested, or state his right to a confirmatory test at a certified lab of his choosing. The employer's drug and alcohol free workplace policies were provided to the claimant in writing.

Because the employer failed to follow all of the provisions of Iowa Code section 730.5, the test was not authorized by law and cannot serve as the basis for disqualifying the claimant from unemployment insurance benefits despite the claimant's positive test for methamphetamine. Based upon the evidence in the record and the application of the appropriate law, the administrative law judge concludes that the claimant was discharged from employment for no disqualifying reason. Therefore, benefits must be allowed.

DECISION:

The June 19, 2018, reference 04, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/scn