BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

DARREK J GRAAP	:	
	:	**HEARING NUMBER:** 14B-UI-14051
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
RIVERSIDE CASINO & GOLF RESORT	:	
Employer.		

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Darrek Graap (Claimant) worked for Riverside Casino and Golf Resort (Employer) as a full-time Beverage Supervisor until November 20, 2013, when the employer discharged him based on a positive random drug test. The Employer has a written policy that calls for discharge from the employment in the event of a positive drug test. (Ex. 3, p. 8). The policy lists that bodily specimens that may be collected for use in the drug testing: urine, saliva, skin, or hair. (Ex. 3, p. 4). The policy includes THC as one of the drugs for which the test will screen. (Ex. 3, p. 3; *see also* 21 U.S.C. §812(c)(17)). The Claimant received a copy of the policy. (Ex. 1; Ex. 2; Ex. 4; Ex. 5).

The Employer uses a third-party to select employees for random drug testing via a computer and number based system. On November 15, 2013, the Employer requested that the Claimant provide two saliva specimens for drug testing. The Claimant complied. The Claimant was subsequently contacted by a representative of a drug testing lab. That person told the Claimant that the saliva specimen had tested

positive for THC. The lab subsequently notified the Employer of the positive drug test. The Employer then notified the Claimant that he was discharged from the employment.

After the Employer received the positive drug test result, the employer sent the Claimant written notice, by certified mail return receipt requested, of his right to have the other saliva sample tested by the same lab or the lab of his choice. The Employer advised the Claimant in the document that his cost if he used the same lab would be $10.00 but that the additional testing would otherwise be at a lab of his choice at his expense. The employer advised the Claimant that the same medical review officer would review the second test result. At the hearing, the Claimant admitted that he had made a mistake and apologized, making clear that he did not question the test result. The Claimant was thus not interested in getting a second sample tested if that sample was taken on the same day as the first.

REASONING AND CONCLUSIONS OF LAW:

Background: Iowa Code Section 96.5(2)(a) (2013) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
>
> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects 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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service,* 321 N.W.2d 6 (Iowa 1982).

Drug Testing in Iowa: We have no doubt that having a positive test result for THC, in violation of the Employer's policy, would constitute disqualifying misconduct. But the Iowa Supreme Court has ruled that an employer cannot establish disqualifying misconduct based solely on a drug test performed in violation of Iowa's drug testing laws. *Harrison v. Employment Appeal Board,* 659 N.W.2d 581 (Iowa 2003); *Eaton v. Employment Appeal Board,* 602 N.W.2d 553, 558 (Iowa 1999). The Court in *Eaton* stated, "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. In such cases the Court has implemented an exclusionary rule of evidence, namely, that failure to comply with Iowa Code §730.5 is reason to exclude from evidence the drug test results. *E.g. Harrison v. Employment Appeal Board*, 659 N.W.2d 581, 586 (Iowa 2003)(illegal test bars the use of "test results to prove misconduct."). Thus we must examine Iowa's drug testing statute to see if the Employer has complied with its requirements.

Substantial compliance with Iowa Code §730.5 is sufficient. *Sims v. NCI Holding Corp*., 759 N.W.2d 333 (Iowa 2009). "Substantial compliance is said to be compliance in respect to essential matters necessary to assure the reasonable objectives of the statute." *Sims v. NCI Holding Corp*., 759 N.W.2d 333, 338 (Iowa 2009)(quoting *Superior/Ideal, Inc. v. Bd. of Review*, 419 N.W.2d 405, 407 (Iowa 1988)). *Sims* ruled that substantial compliance is sufficient to satisfy the notice provision of Iowa Code §730.5(7)(i). There is no reason to believe anything but that substantial compliance with all provisions of §730.5 is all that is required.

Drug Testing In This Case: An employee in Iowa may be subjected to a mandatory drug test only upon certain specified conditions. Relevant here is:

> 8. Drug or alcohol testing. Employers may conduct drug or alcohol testing as provided in this subsection:
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> a. Employers may conduct unannounced drug or alcohol testing of employees who are selected from any of the following pools of employees:
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> (1) The entire employee population at a particular work site of the employer except for employees not subject to testing pursuant to a collective bargaining agreement, or employees who are not scheduled to be at work at the time the testing is conducted because of the status of the employees or who have been excused from work pursuant to the employer's work policy prior to the time the testing is announced to employees.
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> (2) The entire full-time active employee population at a particular work site except for employees not subject to testing pursuant to a collective bargaining agreement, or employees who are not scheduled to be at work at the time the testing is to be conducted because of the status of the employee or who have been excused from work pursuant to the employer's working policy.
>
> (3) All employees at a particular work site who are in a pool of employees in a safety-sensitive position and who are scheduled to be at work at the time testing is conducted, other than employees not subject to testing pursuant to a collective bargaining agreement, or employees who are not scheduled to be at work at the time the testing is to be conducted or who have been excused from work pursuant to the employer's work policy prior to the time the testing is announced to employees.

….

The Code defines "unannounced drug or alcohol testing" as:

> l. "Unannounced drug or alcohol testing" means testing for the purposes of detecting drugs or alcohol which is conducted on a periodic basis, without advance notice of the test to employees, other than employees whose duties include responsibility for administration of the employer's drug or alcohol testing program, subject to testing prior to the day of testing, and without individualized suspicion. The selection of employees to be tested from the pool of employees subject to testing shall be done based on a neutral and objective selection process by an entity independent from the employer and shall be made by a computer-based random number generator that is matched with employees' social security numbers, payroll identification numbers, or other comparable identifying numbers in which each member of the employee population subject to testing has an equal chance of selection for initial testing, regardless of whether the employee has been selected or tested previously. The random selection process shall be conducted through a computer program that records each selection attempt by date, time, and employee number.

Iowa Code §730.5(1)(l). Here the evidence supports that the Employer complied with these requirements.

The next step, the one the Administrative Law Judge addressed, is the means of testing. Iowa Code §730.5(7) sets out the procedure for "[a]ll sample collection and testing for drugs or alcohol under this section." Iowa Code §730.5(7). In addition, there must be review by a medical review officer who consults with the employee. Iowa Code §730.5(7)(c)(2); §730.5(7)(g). The record supports that this did occur here. The section goes on to describe the conditions of testing, and sample handling, and there is no evidence such conditions were not complied with here.

We note that the law specifically address saliva testing handling:

> Notwithstanding any provision of this section to the contrary, collection of an **oral fluid sample** for testing shall be performed in the presence of the individual from whom the sample or specimen is collected. The specimen or sample shall be of sufficient quantity to permit a second, independent, confirmatory test as provided in paragraph "i". In addition to any requirement for storage of the initial sample that may be imposed upon the laboratory as a condition for certification or approval, the laboratory shall store the unused portion of any sample until receipt of a confirmed negative test result or for a period of at least forty-five calendar days following the completion of the initial confirmatory testing, if the portion yielded a confirmed positive test result.

Iowa Code §730.5(7)(f)(3). In addition the definition of "sample" includes "such sample from the human body capable of revealing the presence of alcohol or other drugs, or their metabolites, which shall include only urine, **saliva**, breath, and blood." Iowa Code §730.5(1)(k)(emphasis added). Also the definition of a "[c]onfirmed positive test result" means "the results of a blood, urine, or **oral fluid test** in which the level of controlled substances or metabolites in the specimen analyzed meets or exceeds nationally accepted standards…" Iowa Code §730.5(1)(b) (emphasis added). Including "saliva" in the definition of "sample" means that saliva tests fall within the rules on "sample collection." More critically, the inclusion of "oral fluid test" within the concept of "confirmed positive test result" means

that the disciplinary process that is authorized "[u]pon receipt of a confirmed positive test result for drugs or alcohol which indicates a violation of the employer's written policy" is available if the test result is based on an "oral fluid test." Iowa Code §730.5(10). Obviously, saliva and an "oral fluid" are the same thing. Thus the Code contemplates that saliva tests can be administered, regulates how they are administered, and authorizes action based upon that test result. Thus the Employer's means of testing, the use of a saliva test, was consistent with Code §730.5. We reiterate that we also conclude that the evidence supports that the Employer complied with the other conditions imposed on the means of testing.

Once a test is administered, and a confirmed result reported to the Employer, the Employer must comply with certain notice requirements. In pertinent part §730.5(7) provides:

> i. (1) 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.

Iowa Code §730.5(7)(i)(1)(emphasis added). In *Harrison v. Employment Appeal Board,* 659 N.W.2d 581 (Iowa 2003) the Court explained that the notice "must tell the employee what the cost of that test will be…" Here the evidence supports our conclusion that all notice requirements were complied with as well.

In this matter, the evidence shows that the Employer complied with all the basic requirements of the statute. We find no evidence of any substantial non-compliance by the Employer. While the learned Administrative Law Judge opined that salvia is not an authorized means of testing under 730.5 this is not correct.

Once a positive result comes back for THC the Employer is authorized by law, and by its policy to terminate. Iowa Code §730.5(10). The termination is thus also consistent with the law.

Since the test result is allowed in evidence the Employer has proven that the Claimant did in fact test positive for THC when given the random drug test, when he knew that automatic termination would follow such a test result. We conclude that the Claimant engaged in a wilful disregard of the Employer's interests and benefits are denied.

DECISION:

The administrative law judge's decision dated January 23, 2014 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct. Accordingly, he is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)"a".

The Board remands this matter to the Iowa Workforce Development Center, Claims Section, for a calculation of the overpayment amount based on this decision.

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Monique F. Kuester

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Cloyd (Robby) Robinson

RRA/fnv