

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SCOTT A MARINER
Claimant

APPEAL NO. 07A-UI-04822-MT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KVAERNER SONGER INC
Employer

**OC: 04/01/07 R: 02
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated May 4, 2007, reference 02, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on May 30, 2007. Claimant participated personally. Employer participated by Brian Lowe, Site Supervisor. Exhibit One was admitted into evidence.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on June 21, 2007.

Claimant was discharged on June 21, 2007 by employer because claimant allegedly refused to take a post accident drug test. Claimant had a minor accident with a lift. Claimant was asked to take a urine test. Employer's policy calls for discharge on the first offense for refusal to take a drug test. Claimant understood the policy. Claimant was dehydrated and could not pass urine. Employer deemed such a refusal and immediately discharged. Employees are usually granted two hours to hydrate and provide a specimen. Claimant was written a check and discharged prior to the end of the two-hour wait.

REASONING AND CONCLUSIONS OF LAW:

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).

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning drug testing. Claimant was warned concerning this policy.

The last incident, which brought about the discharge, fails to constitute misconduct because claimant did not refuse to take the test. Claimant was not given a full two hours to provide a specimen prior to discharge. Claimant had a reasonable excuse for not providing the urine specimen. Claimant's testimony is found more credible than that of employer because it was first hand and sworn. Where conflicts exist in the testimony, sworn testimony of a first hand witness is more credible as an issue of law. Employer's testimony that claimant refused the test was hearsay in nature and cannot be granted the same weight as sworn testimony. The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated May 4, 2007, reference 02, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

Marlon Mormann
Administrative Law Judge

Decision Dated and Mailed

mdm/pjs