

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DENNIS RIVERA
Claimant

APPEAL NO: 08A-UI-04985-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KELLY SERVICES INC
Employer

**OC: 04/20/08 R: 02
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Kelly Services, Inc. (employer) appealed a representative's May 19, 2008 decision (reference 03) that concluded Dennis Rivera (claimant) was qualified to receive benefits, and the employer's account was subject to charge because the claimant had been discharged for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 9, 2008. The claimant failed to respond to the hearing notice by contacting the Appeals Section prior to the hearing and providing the phone number at which he could be contacted to participate in the hearing. As a result, no one represented the claimant. Omar Velazcho, a staffing supervisor, appeared on the employer's behalf. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Did the employer discharge the claimant for work-connected misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

The claimant applied to work for the employer on September 5, 2007. The claimant submitted to a pre-employment drug test on September 10 2007. When the claimant started working in a warehouse on September 12, the employer explained that to continue his employment his drug test had to come back negative.

A certified lab sent the test result to the employer on September 14, 2008. Between September 10 and 14, a medical review officer talked to the claimant about the positive results of his drug test. Although the employer received a copy of the drug test in mid-September, the employer did not see the claimant's test results until late September.

On October 2, Velazcho talked to the claimant at the employer's office. The employer told the claimant that since his drug test was positive, the employer could not continue his employment. The employer gave the claimant a written letter explaining that he could have the split sample tested at another certified lab and also told him he could have the split sample tested at a lab he chose if he wanted another test done at his cost. The claimant did not request that the split sample be tested. The claimant did not provide any reason for the positive test result.

The claimant established a claim for benefits during the week of April 20, 2008. He filed claims for the weeks ending April 26 through May 24, 2008. The claimant received his maximum weekly benefit amount of \$104.00 for each of these weeks.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. It is well established that the employer has the burden to prove disqualifying misconduct. Iowa Code section 96.6-2. The only reason the employer discharged the claimant was because of a positive pre-employment drug test.

In Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553 (Iowa 1999), the Iowa Supreme Court determined that in order for a positive drug test to be misconduct sufficient to disqualify someone from unemployment insurance benefits, the drug test had to meet the requirements of the Iowa Drug Testing Law at Iowa Code section 730.5 and that such drug tests would be scrutinized carefully to see that the drug test complied with Iowa law. This decision was expanded by Andrew Harrison v. Employment Appeal Board and Victor Plastics, Inc., 659 N.W.2d 581 (Iowa 2003). In that decision, the Iowa Supreme Court determined that written notice of a positive drug test must be made by certified mail return receipt and the notice must inform the employee of the right to have a second confirmatory test done at a laboratory of the employee's choice and it must tell the employee what the cost of that test will be. The Court further required that an employee be informed that he had seven days to request a second test or confirmatory test.

The evidence establishes that the claimant was informed of the positive drug test by a telephone call from a medical review officer. On October 2, 2007, the employer talked to the claimant and informed him of his right to a confirmatory test and the cost of the second test. On October 2, 2007, the employer also personally handed the claimant a letter setting forth the requirements listed in Iowa Code section 730.5. Based on the facts in this case, the employer followed the law required under Iowa Code section 730.5. Therefore, the employer discharged the claimant for work-connected misconduct. As of September 30, 2007, the claimant is not qualified to receive benefits.

If an individual receives benefits he is not legally entitled to receive, the Department shall recover the benefits even if the individual acted in good faith and is not at fault in receiving the overpayment. Iowa Code section 96.3-7. The record does not indicate that the claimant earned requalifying wages between October 2, 2007 and April 20, 2008. As a result, he is not legally entitled to receive benefits for the weeks ending April 26 through May 24, 2008. The claimant has been overpaid \$520.00 in benefits he received for these weeks.

DECISION:

The representative's May 19, 2008 decision (reference 03) is reversed. The employer discharged the claimant for work-connected misconduct. The claimant is disqualified from receiving unemployment insurance benefits as of September 30, 2007. This disqualification continues until he has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged. The claimant has been overpaid and must repay a total of \$520.00 in benefits he received for the weeks ending April 26 through May 24, 2008.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/pjs