

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TONY L PATTERSON
Claimant

APPEAL NO. 11A-UI-03541-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

**OC: 02/06/11
Claimant: Appellant (2)**

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated March 14, 2011, reference 01, that concluded he was discharged for work-connected misconduct. Telephone hearings were held on April 12 and 15, 2011. The parties were properly notified about the hearings. The claimant participated in the hearings. John Carreras participated in the April 12 hearing and Rowdy Betz in the April 15 hearing on behalf of the employer. Exhibit One was admitted into evidence at the hearing.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked for the employer from February 2, 2010, to August 2, 2010. The claimant was informed and understood that under the employer's work rules, employees were required to submit to a drug test under certain circumstances, including when an employee suffers a compensable injury requiring outside treatment. Under the work rules, employees were subject to (1) termination, (2) professional rehabilitation, or (3) self rehabilitation if they tested positive for drugs for the first time. Employees were allowed to return to work after completing rehabilitation and receiving a negative drug screen. Any positive drug test after completing rehabilitation would result in termination. The claimant was not provided a written copy of the drug testing policy.

The claimant suffered a work-related injury to his knee while working on July 30, 2010. Initially he did not seek outside medical treatment, but his condition worsened on July 31, 2010, and the claimant went to the emergency room. He was diagnosed with a torn knee ligament.

When the claimant reported to work on August 2, 2010, the employer required him to submit to drug testing because of the outside medical treatment he had received. The urine sample was collected by the company nurse who did the initial drug screen, which was positive for marijuana. The sample then was sent to a certified laboratory for confirmatory testing, in which the test result was also positive for marijuana. The employer received the confirmatory results

on August 5, 2010. When the claimant was given the option for a first positive drug test, he chose self-rehabilitation. The claimant was never sent a letter by the employer informing him of the test results and the option to have split sample of his urine tested by a certified lab of his choice at his expense.

The claimant attempted to return to work on August 16. He provided another urine sample, which screened positive for marijuana. The sample then was sent to a certified laboratory for confirmatory testing, in which the test result was also positive for marijuana. The claimant was never sent a letter by the employer informing him of the test results and the option to have split sample of his urine tested by a certified lab of his choice at his expense.

The claimant was discharged by the employer on August 20, 2010, after it received the results of the drug test.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

Iowa Code § 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.

The Iowa Supreme Court has ruled that an employer cannot establish disqualifying misconduct based 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). As 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.

The drug testing relied on by the employer to discharge the claimant violated, at a minimum, Iowa Code § 730.5-7-i. The claimant was never notified of his right under the law to have an independent confirmatory test performed on the sample. He also was not provided a copy of the drug testing policy as required by Iowa Code § 730.5-9-a(1).

Finally, during the hearing, the claimant admitted using marijuana while off duty on the evening of July 30, 2010. In the Eaton case, however, the Iowa Supreme Court focused on whether the drug test complied with the law and not whether the claimant had admitted to using drugs. This was because the reason for the discharge was the positive test result. Likewise, in this case, the claimant was discharged due to the positive test result. Therefore, the claimant is not subject to disqualification because the testing procedures used by the employer did not comply with state law.

DECISION:

The unemployment insurance decision dated March 14, 2011, reference 01, is reversed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/css