

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JESSE E KENDALL
Claimant

APPEAL NO. 10A-UI-14815-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

**AVENTURE STAFFING & PROFESSIONAL
SERVICES LLC**
Employer

OC: 09/26/10
Claimant: Respondent (2R)

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

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated October 25, 2010, reference 03, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on December 14, 2010. Employer participated by Nichole Postello, human resources assistant. Although the claimant responded to the hearing notice and provided a telephone number at which he was to be available, voice mail picked up when the number was dialed by the administrative law judge. A detailed message was left for the claimant on how to participate in the hearing. He did not call prior to the end of the hearing. The record consists of the testimony of Nichole Postello and Employer's Exhibits 1-10.

ISSUES:

Whether the claimant was discharged for misconduct; and
Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a temporary employment agency. The claimant accepted his first assignment from the employer on August 18, 2009. When the claimant was hired, he was given a copy of the employer's written substance abuse policy. He signed a written acknowledgement of receipt of that policy. (Exhibit 1) The employer's written policy states that both prospective employees and employees may be subject to drug tests. If an employee tests positive for drugs, the employee will not be hired for the position sought or subject to termination. (Exhibit 8)

On September 27, 2010, the claimant was offered a position with Saber Communications. This client required a pre-employment drug test. The employer does pre-employment drug testing at its offices. There are staff members who are trained on how to collect samples and test

samples. A split sample was taken. The claimant tested positive for cocaine. The claimant requested a confirmatory test be done. That test was done at St. Luke's Occupational Health Services in Sioux City, Iowa. The test was positive for cocaine. Before the employer was notified about the results of the test, the medical review officer, Richard Thompson, D.O., discussed the results of the test with the claimant. The employer was then notified. A certified letter was sent to the claimant advising him on the results of the test and setting forth his rights to have the specimen retested. The claimant did not request any further testing. The claimant was terminated due to the positive drug test.

REASONING AND CONCLUSIONS OF 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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Iowa Code § 730.5 provides the authority under which a private sector employer doing business in Iowa may conduct drug or alcohol testing of employees. In Eaton v. Employment Appeal Board, 602 N.W.2d 553 (Iowa 1999), the Supreme Court of Iowa considered the statute and held "that an illegal drug test cannot provide a basis to render an employee ineligible for unemployment compensation benefits." Thereafter, in Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003), the Iowa Supreme Court held that where an employer had not complied with the statutory requirements for the drug test, the test could not serve as a basis for disqualifying a claimant for benefits.

The evidence in this case established that the employer complied with the provisions of Iowa Code § 730.5(8) and could require the claimant to take a drug test. The claimant's test was positive for cocaine. The claimant was then terminated by the employer. Misconduct has been established. Benefits are denied.

The next issue is overpayment of benefits.

Iowa Code § 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The overpayment issue is remanded to the claims section for determination.

DECISION:

The decision of the representative dated October 25, 2010, reference 03, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. The overpayment issue is remanded to the claims section for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs