

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JON H SCHWARTZ
Claimant

APPEAL NO. 06A-UI-06508-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DEE ZEE INC
Employer

OC: 12/17/06 R: 02
Claimant: Respondent (1)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Dee Zee, Inc. (employer) appealed a representative's June 18, 2007 decision (reference 04) that concluded Jon H. Schwartz (claimant) was qualified to receive unemployment insurance 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 July 18, 2007. The claimant participated in the hearing. Greg Goss, the director of human resources, and Barb Wright, the safety director, appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

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

FINDINGS OF FACT:

The claimant started working for the employer on September 16, 2005. At the time of hire, the claimant took and passed a pre-employment drug test. The employer informs new employees that the employer's policy has a zero tolerance for drugs at work. If an employee tests positive for a drug, the employer may discharge the employee. The policy further informs employees that if the employee is injured at work, the employer requires the employee to submit to a drug test.

On May 11, 2007, the claimant received a work-related injury and went to the hospital for treatment. The employer did not ask the claimant to submit to a drug test until May 16, 2007. After the results from the drug test came back, a doctor from the testing laboratory talked to the claimant about a positive drug test result. The claimant told the doctor he wanted the split sample tested. Shortly after talking to a doctor, the claimant talked to Wright. During their conversation, the claimant acknowledged that he knew he had tested positive. The claimant repeated that he wanted another test done. Wright informed the claimant that another test was at the discretion of the doctor. The claimant was unable to get a second test completed on the split sample. The employer never sent the claimant a certified letter explaining the claimant's

right to have the split sample tested at a laboratory the claimant chose. The employer discharged the claimant on May 22, 2007 for violating the employer's drug policy. Prior to May 22, 2007, the claimant's job was not in jeopardy.

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 § 96.5-2-a. 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. Iowa Code § 730.5-7-i(1) provides: "If a confirmed positive drug or alcohol test 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." (Emphasis added.)

The employer violated the requirements of Iowa Code § 730.5-7-i(1) by failing to provide the claimant his right to have a second test. The facts indicate that in this case the claimant wanted the split sample tested a second time and was not afforded the opportunity to do this. The employer did not establish that the claimant committed work-connected misconduct. As of May 27, the claimant is qualified to receive unemployment insurance benefits.

Whether the employer's account is subject to charge was previously decided when the claimant established his claim during the week of December 17, 2006.

DECISION:

The representative's June 18, 2007 decision (reference 04) is affirmed. The employer's failure to follow Iowa's drug laws results in the employer discharging the claimant for business reasons that do not amount to work-connected misconduct. As of May 27, 2007, the claimant is qualified to receive benefits, provided he meets all other eligibility requirements.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/css