

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CHARLES W ALLEN**  
Claimant

**APPEAL NO: 10A-UI-01602-DWT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WINEGARD COMPANY**  
Employer

**OC: 01/03/10**  
**Claimant: Appellant (1)**

Section 96.5-2-a - Discharge

**STATEMENT OF THE CASE:**

The claimant appealed a representative's January 25, 2010 decision (reference 01) that disqualified from receiving benefits and held the employer's account exempt from charge because the claimant had been discharged for disqualifying reasons. A telephone hearing was held on March 10, 2010. The claimant participated in the hearing. Tom Kuiper represented the employer. Kerry Hale, and Tim Foster testified on the employer's behalf. During the hearing Claimant Exhibits A and B and Employer Exhibits One through Eight were offered and admitted as evidence.

The administrative law judge reopened the hearing so the parties could submit written documentation from a physician or medical review officer to address the question of whether lidocaine and/or marcaine used in surgery on November 13 could result in a positive drug test on December 1, 2009. The employer sent in a document, which has been identified as Employer Exhibit Nine. The claimant requested an extension until May to submit the requested information because his physician was on maternity leave. The claimant's request for an extension was denied because he was not required to obtain this requested information from his personal physician. The claimant did not submit the requested additional information or object to the Employer's Exhibit Nine. As of the date of this decision, Employer Exhibit Nine is admitted as evidence. 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 work-connected misconduct?

**FINDINGS OF FACT:**

The claimant started working for the employer on July 27, 2009. The claimant worked as a full-time machine operator. On August 26, 2009, the claimant received a copy of the employer's drug policy. The employer's drug policy in part informs employees the employer can request that an employee submit to a drug test if the employer has reasonable suspicion the claimant is using drugs at work or is impaired while working. (Employer Exhibit One.)

After two employees reported they had seen the claimant using crack cocaine at work, Foster asked the claimant to take a drug test on December 1, 2009. The claimant went to the designated lab and provided a urine sample for a drug test. A medical review officer contacted the claimant and told him his drug test was positive for cocaine. The medical review officer asked the claimant about any prescription medication he was taking. The claimant informed the medical review officer about all the medications he was taking and about surgery he had on November 13, 2009. (Claimant Exhibit A.) Based on the information the claimant provided, on December 7, 2009, the medical review officer confirmed that the claimant had a positive drug test for cocaine. (Employer Exhibit Two.)

After the employer learned about the claimant's positive drug test, the employer sent the claimant a certified letter on December 7, 2009. (Employer Exhibit Five.) The letter informed the claimant that he had a positive drug test, and if he wanted the split sample tested at a laboratory of his choice this would be done if the claimant paid \$45.00 for the second test. (Employer Exhibit Four.)

The claimant wanted another test performed on the split sample. The second laboratory received the split sample on December 18, 2009. The employer learned the second test was positive on December 22, 2009. (Employer Exhibit Six.) When this test was also positive, the employer discharged the claimant on December 22, 2009, for violating the employer's drug policy. (Employer Exhibits Seven and Eight.)

#### **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. For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(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 55

Iowa Code section 730.5(8) allows random drug testing due to reasonable suspicion. The evidence in this case established the claimant was tested based on reasonable suspicion. The employer asked the claimant to submit to a drug test and he did on December 1, 2009. The positive test results were reviewed by a medical review officer and the medical review officer talked to the claimant.

The employer sent the claimant a certified letter that contained the results of the test and informed him about his right to have a split sample retested at his own expense. The claimant had the split sample tested. Although the claimant asserted the lidocaine and marcaine used in

his surgery on November 13 was the cause of his positive drug test on December 1, 2009, a preponderance of the credible evidence does not support this assertion. The medical review officer who initially talked to the claimant stated that mardocaine and lidocaine do not show the same on gas chromatography or mass spectrometry. (Employer Exhibit Nine.)

The evidence establishes that the employer complied with the provisions of Iowa Code section 730.5. The employer discharged the claimant for work-connected misconduct – violating the employer's drug policy. As of January 3, 2010, the claimant is not qualified to receive benefits.

**DECISION:**

The representative's Janaury 25, 2010 deicision (reference 01) is affirmed. The employer discharged the claimant for reasons that constitute work-connected misconduct. The claimant is disqualified from receiving unemployment insurance benefits as of January 3, 2010. This disqualification continues until he has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employers' account will not be charged.

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Debra L. Wise  
Administrative Law Judge

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Decision Dated and Mailed

dlw/pjs