

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CRAIG A THOMAS
Claimant

APPEAL NO: 12A-UI-11111-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WINEGARD COMPANY
Employer

OC: 08/19/12
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge

PROCEDURAL STATEMENT OF THE CASE:

The claimant appealed a representative's September 12, 2012 determination (reference 01) that disqualified him from receiving benefits and held the employer's account exempt from charge because he had been discharged for disqualifying reasons. The claimant participated in the hearing. Kerry Hale appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge concludes the claimant is not qualified to receive benefits.

ISSUE:

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

FINDINGS OF FACT:

The claimant started working for the employer on October 31, 2011. He worked full time as a large press operator. Before the employer hired him, the claimant satisfactorily completed a pre-employment drug test. The employer gave him a copy of the employer's written drug and alcohol policy when he started his employment.

The employer's drug and alcohol policy informs employees that if the employer has a reasonable suspicion an employee is under the influence of drugs or alcohol at work, the employer can ask the employee to take a drug test.

On July 26, 2012, the claimant started work at 4 a.m. It was hot and he did some strenuous work before he went on break just before 10 a.m. On break, the claimant went to his car and rested. He was gone longer than the allotted break and a supervisor found him in his car. The claimant may have been sleeping, but he went back to work. Later, management asked the claimant to take a drug test. Management observed the way the claimant talked on July 26 and concluded the employer had reasonable suspicion to have the claimant take a drug test.

The employer took the claimant to a certified medical lab for the drug test. The claimant reported the prescription pain medication he took. As a result of the pain medication he took, the lab clinician told the claimant he would have a positive test result. The claimant's test result

was positive for barbiturates and benzodiazepines. These drugs were not drugs in the claimant's medication.

When the medical review officer talked to the claimant about the results of his drug test, the claimant reported he had taken some his girlfriend's pain medication that morning because he stayed with her and forgotten his own medication. The pain medication prescribed for his girlfriend explained the positive test result for barbiturates and benzodiazepines.

After the employer learned the claimant had a positive drug test because he took his girlfriend's prescribed medication, the employer sent the claimant a certified letter informing him he was discharged and about the positive drug test result and his right to have the split sample tested at a certified laboratory he chose. Before the claimant received the certified letter, he talked to the employer on August 2. He then learned that he could have the split sample tested. The employer also informed him he was discharged for violating the employer's drug and alcohol policy by taking another person's prescription medication. The claimant signed for the certified letter on August 10, 2012.

The employer's drug and alcohol policy indicates the first time an employee, who has worked 12 or months, violates the drug and alcohol policy can be reinstated after receiving a drug evaluation and, if necessary, completes a drug rehabilitation program. If the employee successfully completes a rehabilitation program, the employer reinstates the employee. Since the claimant worked less than 12 months, he was not eligible to participate in the employer's rehabilitation provision of the policy.

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 rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent, or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

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). The *Eaton* court 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(10) states an employer can take disciplinary action against an employee, including termination of employment, upon receipt of "a confirmed positive test result for drugs or alcohol." Before a person can be terminated for a failed drug test, the law requires an employer to notify an employee in writing by certified mail, return receipt requested, of the results of the test, the right to request and obtain a confirmatory test of the second sample collected at an approved laboratory of the employee's choice, and the fee payable to the employer for reimbursement of expenses concerning the test. Iowa Code § 730.5(7)i. The employer satisfied these sections of the law.

Finally, under Iowa Code § 730.5(8), drug or alcohol testing is limited to the following reasons: (1) random testing, (2) drug or alcohol testing after completing of rehabilitation, (3) reasonable suspicion testing, (4) pre-employment, (5) federally required testing, and (6) investigating accidents in the workplace resulting in an injury to a person reportable under chapter 88 or resulting in damage of over \$1,000. The employer established reasonable suspicion to ask the claimant to submit to a drug test on July 26, 2012.

Even though the employer has a provision that allows first-time violators to seek rehabilitation or an evaluation, an employee must have worked at least 12 months before this provision applies. As of July 26, the claimant had not worked 12 months for the employer.

The employer satisfied the provisions of Iowa Code § 730.5 and discharged the claimant for reasons constituting work-connected misconduct. As of August 19, 2012, the claimant is not qualified to receive benefits.

DECISION:

The representative's September 12, 2012 determination (reference 01) is affirmed. The employer discharged the claimant for reasons constituting work-connected misconduct. The claimant is disqualified from receiving unemployment insurance benefits as of August 19, 2012. 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.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/pjs