

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHAD LEE
Claimant

APPEAL NO. 12A-UI-02016-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALTER TRADING CORPORATION
Employer

OC: 01/08/12
Claimant: Respondent (2/R)

Iowa Code § 96.5-2-a - Discharge for Misconduct
Iowa Code § 96.3-7 - Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Alter Trading Corporation (employer) appealed an unemployment insurance decision dated February 14, 2012, reference 01, which held that Chad Lee (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 16, 2012. The claimant did not comply with the hearing notice instructions and did not call in to provide a telephone number at which he could be contacted, and therefore, did not participate. The employer participated through Stephanie Eicher, Human Resources Benefits Specialist; Dr. Rick Garrel, Genesis Occupational Health Medical Review Officer; Steve Eicher, Facility Manager; and Toni McColl, Employer Representative. Employer's Exhibits One and Two were admitted into 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:

The issue is whether the employer discharged the claimant for work-related misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant worked for the employer as a full-time general laborer from December 6, 2010, to December 27, 2011. He was discharged for providing an adulterated urine sample for a random drug test. The employer has a written drug policy that informs employees of the drug testing procedures and for which drugs the employer will be testing. An employee's first confirmed positive drug or alcohol test or first confirmed abuse of a legal drug will result in a three-day suspension and required treatment. An employee is subject to discharge for refusing to submit to a drug or alcohol test.

The claimant was chosen on a random basis by a third party company for a drug test to be performed. He was not working on the day he was chosen so the employer notified him on December 19, 2011 and the claimant drove himself to Genesis Occupational Health to provide the urine sample. The claimant signed a certification on December 19, 2011 which confirmed

that he provided a specimen to the health clinic and that he did not adulterate the specimen provided.

The laboratory reported the test results as a substituted sample based on the creatinine level being inconsistent with human urine. The test results were reviewed by Dr. Rick Garrell, a qualified medical review officer (MRO), and he verified the result. The medical review officer, Dr. Rick Garrell, concluded that the claimant's urine sample was inconsistent with human urine due to the low creatinine level. No further testing is done with a substitute sample and the claimant is considered to have refused the drug test. Dr. Garrell contacted the employer and Facility Manager Steve Eicher called the claimant into his office to advise him of the results. The claimant said he did not know how that happened but did not pursue it further and was discharged at that time.

The claimant filed a claim for unemployment insurance benefits effective January 8, 2012 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for violation of the employer's drug and alcohol policy due to his failure to provide a non-adulterated urine sample for a random drug test. Iowa Code § 730.5 sets forth the rules by which a private company may screen its employees for use of illegal drugs. 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 employer has a written drug testing policy per Iowa Code § 730.5(9)(b) and tested the claimant on a random basis. The policy also provides for discharge if an employee refuses testing. The employer has met the requirements of Iowa Code § 730.5. The preponderance of the evidence establishes that the claimant willfully violated the employer's drug testing policy through his substituted test result. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code § 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated February 14, 2012, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css