

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BILLY R RODGERS

Claimant

APPEAL NO: 11A-UI-11818-D

**ADMINISTRATIVE LAW JUDGE
DECISION**

REMEDY INTELLIGENT STAFFING INC

Employer

OC: 07/24/11

Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Billy R. Rodgers (claimant) appealed a representative's August 29, 2011 decision (reference 03) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Remedy Intelligent Staffing, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held on November 30, 2011. The claimant failed to respond to the hearing notice and appear at the time and place set for the hearing, and therefore did not participate in the hearing. J. T. Breslin appeared on the employer's behalf. During the hearing, Employer's Exhibits One and Two were entered into evidence. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The employer is a temporary employment firm. The claimant's first and only assignment with the employer began on March 25, 2011. He worked full time as an operator at the employer's business client on the first shift. His last day on the assignment was July 21, 2011. The assignment ended because the business client and the employer determined to end the assignment due to a positive drug test.

The claimant had been involved in an incident causing about \$1,000.00 in damage to the client's product. Also, the client reported that the claimant had been demonstrating erratic behavior. As a result of these issues, the client requested that the employer's on-site representative perform a drug test on the claimant.

The on-site representative had the claimant provide a urine sample, which went into an "instant read" container. When the container was read, it indicated that the sample was positive for methamphetamine. The employer only obtains confirmatory testing if an employee challenges the results of the "instant read" test, and then does not have the original sample tested, but

would sent the employee to a laboratory for collection and testing of a new sample. The claimant did indicate that he was on a prescription for an amphetamine, but in discussions with the providers of the “instant read” test, Breslin, the area manager, was told that the amphetamine prescription would not yield a false positive for methamphetamine. The claimant did not raise any other challenge to the test result, so no further testing was done, and the claimant was verbally advised that he was discharged.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant’s employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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; 871 IAC 24.32(1)a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

The reason cited by the employer for discharging the claimant is violation of the employer’s drug and alcohol policy through a positive drug test. In order for a violation of an employer’s drug or alcohol policy by a positive drug or alcohol test to be disqualifying misconduct, it must be based on a test performed in compliance with Iowa’s drug and alcohol testing law. Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003); Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553, 558 (Iowa 1999). The Eaton court said, “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. In Harrison, the court specifically noted the statutory requirement that the employer must give the employee a written notice of the positive drug test, sent by certified mail, return receipt requested, informing the employee of his right to have the split sample tested at a laboratory of his choice and at a cost consistent with the employer’s cost.

The statute specifically provides that an employer may not take “adverse employment action” such as discharge against an employee because of a believed positive drug test unless the employer has “confirmed positive test result.” Iowa Code § 730.5(7)(f). “[C]onfirmation shall be by use of a different chemical process than was used in the initial screen for drugs or alcohol. The confirmatory drug or alcohol test shall be a chromatographic technique such as gas chromatography/mass spectrometry, or another comparably reliable analytical method.” Id. The sample upon which a discharge discussion is based must also be collected in the manner specified by the Code, which includes preservation of a split portion of the sample. The employer did not comply with the Code provisions for collecting and testing of the sample upon which the discharge decision was based. Further, the employer did not provide any written notice, by certified mail or otherwise of the claimant’s right to have a split portion of the sample tested at a laboratory of his choosing.

The employer has not substantially complied with the drug testing regulations. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the

evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's August 29, 2011 decision (reference 03) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css