

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

JOSHUA TICHLER
9055 - 17TH ST APT 1
FULTON IA 61252

L A LEASING INC
SEDONA STAFFING
612 VALLEY DR
MOLINE IL 61265

Appeal Number: 06A-UI-07232-BT
OC: 05/28/06 R: 04
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.***

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96 5-2-a – Discharge for Misconduct
Section 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Sedona Staffing (employer) appealed an unemployment insurance decision dated July 6, 2006, reference 01, which held that Joshua Tichler (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 August 7, 2006. The claimant participated in the hearing. The employer participated through Colleen McGuinty, Unemployment Benefits Administrator and Dawn Fulton, Account Manager. Employer's Exhibits One through Three were admitted into evidence.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time temporary laborer from October 21, 2005 through March 7, 2006. Shortly after being hired, he read and signed an acknowledgment of the employer's written drug policy, which advised him of the drug testing procedures and the drugs for which the employer will test. The claimant was temporarily assigned to work at Ipsco, which has its own written drug policy that the claimant also read and acknowledged in writing. He was chosen on a random basis by computer for a drug test to be performed on February 28, 2006. The claimant was taken to Medical Associates where he provided a urine sample that was split and sent to Qwest Diagnostics. Qwest Diagnostics confirmed a positive result for cocaine and marijuana and the medical review officer, Dr. Wade Lenz, contacted the claimant on March 2, 2006 to inform him of the positive results. The claimant could offer no explanations and Dr. Lenz advised him of the opportunity to have the split sample retested. Dr. Lenz then notified the employer of the positive results.

On that same date, the employer sent the claimant a letter by certified mail, return receipt requested, advising him of the positive results. The letter advised the claimant of his right to obtain a confirmatory test of the secondary sample that was taken at the time of the initial test and that the cost of the test would be his responsibility. The employer also advised the claimant, "If you have any questions or desire a confirmatory test, please contact me pursuant to the Iowa Code 2003 Supplement Section 730.5." The employer never heard from the claimant after that.

The claimant filed a claim for unemployment insurance benefits effective May 28, 2006 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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 positive drug test for cocaine and marijuana. Iowa Code §730.5 sets forth the rules by which a private company may screen its employees for use of illegal drugs. The employer has a written drug testing policy per Iowa Code §730.5(9)(b) which advises its employees as to which drugs will be tested. The assignment employer, Ipsco, also has a written drug policy and the claimant was chosen to be drug tested on a random basis pursuant to that policy. The test was performed during the workday on February 28, 2006 at Medical Associates and split samples were taken at the time of collection. Iowa Code §§ 730.5(6) and (7)(a-c).

Qwest Diagnostics confirmed a positive result for cocaine and marijuana. A medical review officer reviewed and interpreted the confirmed positive test result and notified the claimant of the positive results before reporting the results to the employer; Iowa Code § 730.5(7)(g). The medical review officer questioned the claimant as to the positive results but the claimant gave no explanation. The claimant was notified by certified mail, return receipt requested of the positive result and his right to obtain a confirmatory test of the secondary sample. Iowa Code § 730.5(7)(i)(1) and (2). He was advised if he had any questions or wanted to test the secondary sample, he needed to notify the account coordinator "pursuant to the Iowa Code 2003 Supplement: Section 730.5." The claimant took no further action.

The employer reported the claimant effectively admitted usage of cocaine and marijuana at the fact-finding interview. Likewise, the fact finder's notes indicate the claimant said, "I had used cocaine and marijuana, so I knew the split sample would yield the same results." The claimant denied making that statement to the fact finder. Regardless of what was said at the fact-finding interview, the employer has met the requirements of Iowa Code §730.5. 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:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The unemployment insurance decision dated July 6, 2006, 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 claimant is overpaid benefits in the amount of \$1,512.00.

sdb/pjs