

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

REGNALD D HOWZE
Claimant

APPEAL NO: 10A-UI-17057-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SOS STAFFING SERVICES INC
Employer

OC: 12/24/10

Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

SOS Staffing Service, Inc. (employer) appealed a representative's December 2, 2010 decision (reference 02) that concluded Regnald D. Howze (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 25, 2011. The claimant participated in the hearing and was represented by Harley Erbe, Attorney at law. Darlene Mace appeared on the employer's behalf and presented testimony from two other witnesses, Frank Long and Jolene Slack. During the hearing, Employer's Exhibits One through Four were entered 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:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The employer is a temporary employment firm. The claimant began taking assignments with the employer in July 2009. He worked virtually continuously on a series of assignments at the same Waukee, Iowa business client through October 23, 2010. He was then off work for lack of work through October 29. He returned to the assignment a final time on November 1, and worked through November 4. He was off work after that date because of an injury he incurred on the assignment on November 4, and the employer's determination to discharge him because of a positive drug test resulting from a post-accident test administered on November 5.

On November 5 the claimant reported to the employer's office and reported his injury, which was a lower back and elbow injury. He did receive some medical treatment under the employer's worker's compensation program and was given some work restrictions; the employer understood this was reported for purposes of OSHA. Pursuant to the employer's policies, he was required to submit to a post-accident drug test. While in the employer's office, he was directed to provide a urine sample in a specially treated collection cup. He was not initially able to provide a sample, and waited for a period of time until he felt he could provide a

sample. When he was given the same cup back, he questioned whether he should be given a fresh cup to avoid any potential for contamination, since the cup had been sitting out while the claimant waited, but was told to go ahead and use the same cup.

The cup had a form of sensor which indicated to the employer that the sample was “not negative.” It was therefore determined that the sample would be forwarded to a testing laboratory for further testing. There was not a split portion of the sample retained in a separate vial. The testing laboratory’s medical review officer (MRO) returned a report indicating that the sample was positive for marijuana, but the report does not indicate what type of confirmation test was utilized. The MRO did not contact the claimant to discuss the results and any potential reason for a false positive. On November 12 the employer verbally informed the claimant of the positive test result and the decision to discharge him from the employment. The employer did not provide the claimant with any written notification of the results or of any right to have a split portion of the sample (which did not exist) retested.

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 laws. 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. There are a myriad of areas in which the employer’s procedure is at least potentially not in compliance with the Iowa law, but the administrative law judge will here only focus on the two most critical and definite concerns.

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 court found this notice to be essential to minimal compliance with the drug testing law. The employer did not provide any written notice, by certified mail or otherwise.

Almost more disturbing is the employer's failure to ensure that there even was a split portion of the original sample distinctly retained in order to effectuate the employee's statutory right to have the split portion separately tested. The requirement of the split sample, found in Iowa Code § 730.5(7)b, is a critical element for any non-DOT drug testing conducted on an employee in Iowa. The employer has not substantially complied with the Iowa drug testing law. Therefore, 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 December 2, 2010 decision (reference 02) is affirmed. 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

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