

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PHILLIP W SISK
Claimant

APPEAL NO: 11A-UI-16093-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

JACOBSON STAFFING COMPANY LC
Employer

**OC: 11/06/11
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a - Discharge

PROCEDURAL STATEMENT OF THE CASE:

The employer appealed a representative's December 6, 2011 determination (reference 01) that held the claimant qualified to receive benefits and the employer's account subject to charge because the claimant had been discharged for nondisqualifying reasons. The claimant did not respond to the hearing notice or participate in the hearing. Kristen Moore and Ann Origer appeared on the employer's behalf. Based on the evidence, the employer's arguments, and the law, the administrative law judge finds the claimant qualified to receive benefits.

ISSUE:

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

FINDINGS OF FACT:

The employer is a temporary employment firm. The employer assigned the claimant to work at a long-term assignment. The claimant began this assignment on April 27, 2011. The employer's written drug policy informs employees the employer can ask an employee to submit to a drug test under certain conditions. The policy further states that if the drug test is positive, the employee is ineligible to work for the employer.

On October 24, the client reported the claimant leaving a car that had a strong odor of marijuana. After receiving this report, the employer asked the claimant to submit to a drug test. The drug test was completed at McFarland Clinic. A medical review officer contacted the claimant with the results of the test. The employer was told the test was positive. The employer allows an employee to take another drug test within 24 hours, but the drug test cost is the responsibility of the employee. The employer does send certified letters to employees advising them they can have a second drug test at a laboratory of their choice. If an employee does not indicate they disagree with the test results, the employer does not mention the second drug sample and test.

The employer discharged the claimant because he failed the drug test and violated the employer's drug 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 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. Iowa Code § 730.5(9)a 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." However, for a person to 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. (Emphasis added.) The employer violated this section of the law.

It would be contrary to the spirit of chapter 730 to disqualify the claimant from receiving unemployment insurance benefits based on a drug test that is not in compliance with the law. Therefore, as of November 6, 2011, the claimant is qualified to receive benefits.

DECISION:

The representative's December 6, 2011 determination (reference 01) is affirmed. The employer discharged the claimant, but the evidence does not establish that the claimant committed work-connected misconduct. As of November 6, 2011, the claimant is qualified to receive benefits, provided he meets all other eligibility requirements. The employer's account is subject to charge.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/kjw