

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TROY D PONCY
Claimant

APPEAL NO. 12A-UI-02962-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MC WANE INC
Employer

OC: 02/12/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated March 23, 2012, reference 01, that concluded he was discharged for work-connected misconduct. A telephone hearing was held on April 9, 2012. The parties were properly notified about the hearing. The claimant failed to participate in the hearing. David Cummins participated in the hearing on behalf of the employer. Exhibits One through Three were admitted into evidence at the hearing.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked for the employer during his last period of employment from May 2009 to February 14, 2012. He was informed and understood that under the employer's drug testing policy, employees were required to submit to a drug test under certain circumstances, including when randomly chosen, and were considered to have violated the policy if they tested positive for drugs. Employees are subject to termination if they test positive for drugs.

Pursuant to the policy, the claimant was required to submit to a random drug test on February 9, 2011. A urine sample was properly taken from the claimant and analyzed using an initial drug screen test and subsequent confirmatory test by a certified laboratory. The urine sample was split to allow a test to be conducted on the second split sample. The test results were positive for marijuana metabolites.

The claimant spoke to a medical review officer on February 14 who informed him about positive test results for marijuana. The claimant was not asked by the medical review officer or anyone associated with the testing for the medications that he was taking or for other medical information relevant to the test.

The industrial relations manager informed the claimant on February 14 that he was suspended because of the positive drug test result. The claimant left the workplace after his suspension.

A certified letter was sent to the claimant notifying him that he was suspended for the positive drug test result. He was also informed that he had the right to obtain a second confirmatory test of the split sample. To arrange the split sample test he had to contact the medical review office, and do so within seven days or he would be terminated. The letter stated he would have to pay for the test at the cost of approximately \$250.00 but would be reimbursed and reinstated if the test was negative.

The claimant contacted the medical review officer about having the split sample tested. He was informed that the cost would be \$215.00. The medical review officer said that he would not get to choose the lab that would perform the test. He was told that the employer was charged about \$50.00 for the first test. The claimant declined to have the split sample tested because he did not have money to pay for the test.

After seven days, the claimant's employment was terminated for the positive test result for marijuana.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. Disciplinary suspensions are treated as discharged for the purpose of the unemployment insurance law. 871 IAC 24.32(9). The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

The Iowa Supreme Court has ruled that an employer cannot establish disqualifying misconduct based on drug or alcohol testing performed in violation of Iowa law. *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 question then is whether the employer complied with the drug-testing procedures of Iowa Code § 730.5. One requirement of the statute is for employees to have an opportunity to provide "any information which may be considered relevant to the test, including identification of prescription or nonprescription drugs currently or recently used, or other relevant medical information." Iowa Code § 730.5-7-c(2). There is no evidence the claimant was provided that opportunity even though he was in fact taking several medications. Another requirement is for the employer to notify the employee in writing by certified mail, return receipt requested, of the results of the test, the employee's 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 by the employee to the employer for reimbursement of expenses concerning the test. The fee charged an employee shall be an amount that represents the costs associated with conducting

the second confirmatory test, which shall be consistent with the employer's cost for conducting the initial confirmatory test on an employee's sample." Iowa Code § 730.5-7-i(1). The claimant's cost for the second test was not consistent with the employer's cost and the claimant was not given a choice of what laboratory to conduct the second test, according to the evidence in this case.

The claimant is not subject to disqualification because the testing procedures used by the employer did not comply with state law. See *Eaton*, 602 N.W.2d at 558.

DECISION:

The unemployment insurance decision dated March 23, 2012, reference 01, is reversed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/css