

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GEORGE L FRAISSINET
Claimant

APPEAL NO: 10A-UI-14603-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MASON DIXON INTERMODAL INC
Employer

OC: 09/26/10

Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

George L. Fraissinet (claimant) appealed a representative's October 21, 2010 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment after a separation from employment from Mason Dixon Intermodal, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 10, 2010. The claimant participated in the hearing. Dennis Figgins appeared on the employer's behalf. 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 claimant started working for the employer on October 13, 2008. He worked full time as a power mechanic in the employer's Council Bluffs, Iowa storage yard. His last day of work was September 24, 2010. The employer discharged him on that date. The reason asserted for the discharge was violation of the employer's drug and alcohol policy by having a positive drug test result.

The claimant was selected for a non-DOT random drug test on or about September 17. His selection was made through a consortium which randomly selects employees from a pool of employees of various employers. He was sent to a clinic for collection of a sample, which was then sent to a laboratory. It does not appear that the claimant was informed of what substances for which the sample would be tested, nor does it appear that there was a split portion of the sample prepared for potential retesting. It does not appear that the claimant was given an opportunity to give any explanation as to any medical issues that could affect the test results.

On September 24 the employer learned from the testing laboratory that the sample had tested positive for marijuana. It is not clear what type of testing process was utilized in arriving at that conclusion. The employer then confronted the claimant and discharged him. He was not given

any written information, and specifically was not advised of any opportunity for verification of the test results on any split portion of the sample.

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. In Harrison, the court specifically noted as essential to this compliance 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 employer did not provide any written notice, by certified mail or otherwise. Iowa Code § 730.5(7)(l)(1). It does not appear that there was even a split sample retained as required. Iowa Code § 730.5(7)(b). The statute is specific as to what type of testing procedure must be used, and the employer has not established compliance with that procedure. Iowa Code § 730.5(7)(f)(1). The statute requires notice to the employee of the substances for which a sample is to be tested, and an opportunity to provide a medical explanation, neither of which appears to have occurred in this instance. Iowa Code § 730.5(7)(c)(2). The employer has not substantially complied with the drug testing requirements. Therefore, 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 October 21, 2010 decision (reference 01) 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/pjs