

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DAVID E KUPFER**  
Claimant

**APPEAL NO. 06A-UI-09708-CT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ECONOMY COATING SYSTEMS INC**  
Employer

**OC: 09/03/06 R: 04**  
**Claimant: Respondent (1)**

Section 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Economy Coating Systems, Inc. filed an appeal from a representative's decision dated September 28, 2006, reference 01, which held that no disqualification would be imposed regarding David Kupfer's separation from employment. After due notice was issued, a hearing was held by telephone at 9:00 a.m. on October 17, 2006. The employer participated by Robin Genco-Marcucci, Controller. Exhibits One and Two were admitted on the employer's behalf.

Mr. Kupfer responded to the notice of hearing and the administrative law judge made at least eight attempts to reach him at the scheduled time of the hearing. However, the line was always busy. Mr. Kupfer contacted the Appeals Bureau at 9:55 a.m. to report that there was a problem with his telephone line. When he responded to the notice of hearing, he was advised to contact the Appeals Bureau if he had not been called for the hearing by five minutes after the scheduled hearing time. Although he had a cell phone available and could have called sooner, he delayed calling until almost 10:00 a.m. The hearing record closed at 9:28 a.m. Because Mr. Kupfer could have participated in the hearing if he had followed the instructions given when he responded to the notice of hearing, the administrative law judge declined to reopen the hearing record.

**ISSUE:**

At issue in this matter is whether Mr. Kupfer was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

Having heard the testimony of the witness and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Kupfer was employed by Economy Coating Systems, Inc. from April 25, 2005 until August 24, 2006 as a full-time loader. On August 22, 2006, he was involved in an accident at work while operating a forklift. He sustained an injury to his back when he attempted to hold back falling product. As a result of the accident, Mr. Kupfer was required to undergo drug testing. He had been notified of the requirement in written policies he received on October 28, 2005.

A urine specimen was taken on August 22. The employer was notified on or about August 25 that Mr. Kupfer had tested positive for marijuana metabolites. As a result, he was discharged from the employment. The employer did not send him a letter by certified mail, return receipt requested, advising Mr. Kupfer that he had seven days in which to request that a split of his original specimen be retested.

#### **REASONING AND CONCLUSIONS OF LAW:**

Mr. Kupfer was discharged from employment. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Mr. Kupfer was discharged after he tested positive for illicit drugs following an accident at work. The testing was authorized by Iowa Code section 730.5(8)f. The employer provided notice of its policy that testing would be conducted when an individual is involved in an accident at work.

Because Mr. Kupfer tested positive for an illicit drug, the employer was required to provide him with written notice of certain rights. The employer was required to send him a certified letter, return receipt requested, advising that he had seven days in which to request that a second confirmatory test be conducted on a split of his original sample. Section 730.5(7)i. The certified letter had to advise Mr. Kupfer of his right to have the testing conducted at a laboratory of his choice and the fee he was to pay to the employer for the second test. Neither the employer nor anyone acting on its behalf provided Mr. Kupfer the notice required by section 730.5(7)i. The fact that Mr. Kupfer may have acknowledged using marijuana within the weeks prior to the testing did not prohibit him from exercising his right to dispute the drug test results. The law allowed him seven days in which to decide whether he wanted to have the second testing conducted.

Because the employer did not comply with the provisions of Iowa's drug testing law, the drug test results cannot form a basis on which to deny Mr. Kupfer job insurance benefits. Accordingly, benefits are allowed.

#### **DECISION:**

The representative's decision dated September 28, 2006, reference 01, is hereby affirmed. Mr. Kupfer was discharged but disqualifying misconduct has not been established. Benefits are allowed, provided he satisfies all other conditions of eligibility.

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Carolyn F. Coleman  
Administrative Law Judge

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Decision Dated and Mailed

cfc/pjs