

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROBERT S GESUALDO

Claimant

APPEAL NO. 08A-UI-05371-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EAST WEST STAFFING LLC

Employer

**OC: 07/29/07 R: 04
Claimant: Respondent (1)**

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

East West Staffing LLC (employer) appealed a representative's May 30, 2008 decision (reference 05) that concluded Robert S. Gesualdo (claimant) was qualified to receive benefits, and the employer's account was subject to charge because the claimant's employment separation was for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 23, 2008. The claimant participated in the hearing. Michelle Mutchler, the employer's on-site supervisor, 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:

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

FINDINGS OF FACT:

The employer is a staffing firm. The employer assigned the claimant to a warehouse job on October 25, 2007. During orientation, the claimant received information that if employees were involved in a forklift accident that resulted in a personal injury to anyone, the forklift operator would be required to take a post-accident drug test. The orientation information also informed employees about their right to have a split sample tested if the drug test was positive.

On March 24, 2008, the claimant had an accident with the forklift he operated. Another employee was injured. The employer asked the claimant to submit to a drug test. The claimant submitted to the drug test. When the initial test indicated the test was positive, the employer suspended the claimant and sent the sample to a certified lab.

On or about March 28, a medical review officer contacted the claimant and told him his test was positive. The medical review officer asked the claimant if he was taking any medication. The claimant informed the medical review office about the medications he was on. The medical review officer did not say anything to the claimant. On March 28, 2008, the employer received information from the lab that the claimant's test result was positive. The employer then

contacted the claimant and discharged him for having a positive drug test. Since the employer's handbook informed employees that they could have a split sample tested, the employer did not provide this information to the claimant again.

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.

Employers may conduct drug or alcohol testing in investigating accidents in the workplace in which the accident resulted in an injury to a person for which injury, if suffered by an employee, a record or report could be required under chapter 88, or resulted in damage to property, including to equipment, in an amount reasonably estimated at the time of the accident to exceed one thousand dollars. Iowa Code § 730.5-8-f. Employers are only allowed to drug test if they have a written policy in place authorizing such testing consistent with the law. Iowa Code § 730.5-9. In this case, the employer requested that the claimant submit to a drug test after the claimant was involved in a forklift accident that resulted in personal injury to another employee. The language of the statute makes it clear that the purpose of post-accident drug testing is to determine whether an accident resulting in a reportable injury was related to drug use by the party involved in the accident. In my judgment, the drug testing in this case was authorized by the statute.

Additionally, Iowa Code § 730.5(7)(i)(1) requires that the employer give an employee written notice of a positive test result. Such notice must be by certified mail, return receipt requested. The notice must inform the employee of his right to have a second confirmatory test done at a laboratory of his choice and it must tell the employee what the cost of that test will be. Any fee charged by the employer must be consistent with the cost to the employer of the initial confirmatory test. In this case, no notice was sent to the claimant after the employer learned the drug test was positive. As a result, the claimant did not realize he could have his split sample tested by another laboratory. The employer did not meet the requirements of Iowa Code § 730.5(7)(i)(1). The Iowa Supreme Court has specifically ruled that a positive drug test after such violation cannot be used to disqualify a claimant. Harrison v. Employment Appeal Bd., 659 N.W.2d 581 (Iowa 2003). Therefore, the claimant is qualified to receive benefits based on this separation from employment.

DECISION:

The representative's May 30, 2008 decision (reference 05) is affirmed. The employer discharged the claimant for reasons that do not disqualify the claimant from receiving benefits. As of April 27, 2008, the claimant is qualified to receive benefits, provided he meets all other

eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/css