IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

JAMES D HAWKINS
1305 DOUGLAS
DES MOINES IA 50313

FLYING J INC
TALX – EMPLOYERS UNITY
PO BOX 749000
ARVADA CO 80006 9000

Appeal Number: 05A-UI-11536-DWT
OC: 10/15/05 R: 11/02/05
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Flying J, Inc. (employer) appealed a representative's November 2, 2005 decision (reference 01) that concluded James D. Hawkins (claimant) was qualified to receive unemployment insurance benefits, and the employer's account was subject to charge because the claimant had been discharged for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 29, 2005. The claimant responded to the hearing notice, but could not be contacted at the time of the hearing. Tiffany McMaster, a representative with TALX- Employers Unity, appeared on the employer's behalf with Matt Dorr, the general manager. During the hearing, Employer's Exhibits One, Two and Three were offered and admitted as evidence.

After the hearing had been closed and the employer had been excused, the claimant contacted the Appeals Section. The claimant made a request to reopen the hearing. Based on the claimant's request to reopen the hearing, 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.

ISSUES:

Is there good cause to reopen the hearing?

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

FINDINGS OF FACT:

The claimant started working for the employer on March 7, 2004. The claimant worked full time as utility and buffet attendant. The claimant received a copy of the employer's drug policy. (Employer's Exhibit One.) The drug policy informs employees they are subject to random drug tests and will be discharged if they have a positive drug test.

On October 7, 2005, the employer asked the claimant to submit to a random drug test. The claimant had the drug test. The employer learned the claimant's drug test was positive for one of the substances tested. A medical review officer contacted the claimant and talked to the claimant about the results of the test. The employer did not send a certified letter to the claimant informing him he had the right to have the split sample tested at his cost. On October 9, 2005, the employer discharged the claimant for violating the employer's drug policy.

The claimant contacted the Appeals Section on November 29 after the hearing had closed and after the employer had been excused. The claimant had been outside at the time of the hearing and did not hear the phone ring. The claimant made a request to reopen the hearing.

REASONING AND CONCLUSIONS OF LAW:

If a party responds to a hearing notice after the record has been closed and the party who participated at the hearing is no longer on the line, the administrative law judge can only ask why the party responded late to the hearing notice. If the party establishes good cause for responding late, the hearing shall be reopened. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. 871 IAC 26.14(7)(b) and (c).

Although the claimant was called for the hearing, he was outside and not available for the hearing. By the time the claimant contacted the Appeals Section, the hearing had been closed and the employer was no longer on the phone. For unemployment insurance purposes, the claimant did not establish good cause to reopen the hearing. Therefore, the claimant's request is denied.

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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or

repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(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.

The employer has the burden of proving that the requirements of Iowa Code §730.5 have been met. Iowa Code §730.5-15-b. One requirement states employers must notify employees by certified mail, return receipt requested, of the test results and their right to have an independent test performed on the second sample at an approved laboratory. Iowa Code §730.5-7-i(1). In this case, the employer did not notify the claimant by certified letter. If the employer relied on the laboratory to provide the claimant with the right to have an independent test conducted on the split sample, this does satisfy the requirements of the law. The employer violated the statute when it did not send the notice by certified mail.

As in Eaton, the claimant was discharged due to the positive test result. The claimant is not subject to disqualification because the testing procedures used by the employer do not comply with state law.

DECISION:

The claimant's request to reopen the hearing is denied. The representative's November 2, 2005 decision (reference 01) is affirmed. The employer discharged the claimant for business reasons that do not constitute work-connected misconduct. As of October 16, 2005, 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.

dlw/s