

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TIMOTHY B HOUSH
Claimant

APPEAL NO: 11A-UI-07580-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ASPLUNDH TREE EXPERT CO
Employer

OC: 05/08/11
Claimant: Respondent (1)

Iowa Code § 96.5(2)a - Discharge

PROCEDURAL STATEMENT OF THE CASE:

The employer appealed a representative's May 31, 2011 determination (reference 01) that held the claimant qualified to receive benefits and the employer's account subject to charge because the claimant had been discharged for nondisqualifying reasons. The claimant participated in the hearing with his wife, Lorrie. Eric Nelson, the general foreman in the Council Bluffs area, and Adam Larson, a supervisor, appeared on the employer's behalf. During the hearing, Employer Exhibits One, Two and Three were offered and admitted as evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge concludes the claimant is qualified to receive benefits.

ISSUE:

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

FINDINGS OF FACT:

The claimant started working for the employer in January 2010. He worked full time as a trimmer and sometimes as a foreman. The claimant received the employer's substance abuse policy when he began working. The policy informs employees that the employer expects all employees to report to work free of drugs and the employer can ask an employee to submit to a drug test when there is reasonable suspicion the employee is under the influence of a drug. (Employer Exhibit Two.)

On February 28, Nelson received information from a couple of employees that they believed the claimant was using drugs. On March 1, Nelson noticed the claimant acted tired and sluggish, which was not how he usually acted. Based on information from employees from the day before and Nelson's observations, the employer asked the claimant to submit to a drug test. The claimant went to Cass County Memorial Hospital to take a drug test on March 1, 2011. (Employer Exhibit Three.) The claimant was then off work until the employer received the results of the drug test.

A medical review officer, a doctor, contacted the claimant on March 9 and told him his test was positive for one of the substances tested. (Employer Exhibit One.) After the claimant learned

about the test results, the employer learned he had a positive drug test. The employer talked to the claimant about enrolling in a substance abuse program and told him that if he followed all the conditions of the program, he could return to work. The claimant signed a form on March 10, 2011, indicating he was going to enroll in a substance abuse program.

After the claimant learned he had to pay \$500.00 for the treatment and his insurance did not cover the treatment, he could not afford to enroll in the program. The claimant understood he could only obtain treatment at the facility the employer approved. When the claimant told Nelson he did not have \$500.00 and asked if the employer could help him cover this expense, Nelson looked into the possibility of cashing out the claimant's accrued vacation time. Management agreed the claimant's vacation time could be paid out and issued him a check in late March. The claimant used this money for other financial obligations and did not go through any treatment. On April 14, Nelson verified the claimant had not enrolled in a treatment program as he indicated he would on March 10, 2011. After learning the claimant had not enrolled in any treatment program by June 14, the employer no longer considered him an employee.

The employer's policy allows employees who have a positive test to have the split sample tested at a laboratory of the employee's choice. (Employer Exhibit Two.) The employer does not and did not send the claimant a certified letter informing him of this opportunity.

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. 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.

Iowa Code § 730.5(9)a states an employer can take disciplinary action against an employee including termination of employment, upon receipt of "a confirmed positive test result for drugs or alcohol." However, for a person to be terminated for a failed drug test, the law requires an employer to notify an employee in writing by certified mail, return receipt requested, of the results of the test, the 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 to the employer for reimbursement of expenses concerning the test. Iowa Code § 730.5(7)i. The employer violated this section of the law.

It would be contrary to the spirit of chapter 730 to disqualify the claimant from receiving unemployment insurance benefits based on a drug test that is not in compliance with the law. Therefore, the claimant is qualified to receive benefits.

DECISION:

The representative's May 31, 2011 determination (reference 01) is affirmed. The employer discharged the claimant for business reasons, but did not establish that the claimant committed work-connected misconduct when the employer did not comply with Iowa's drug testing laws. As of May 8, 2011, the claimant is qualified to receive benefits, provided he meets all other eligibility requirements. The employer's account is subject to charge.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/css