

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NATHANIEL D NORRIS
Claimant

APPEAL NO. 10A-UI-07740-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HARVEYS BR MANAGEMENT CO INC
Employer

OC: 04/25/10
Claimant: Respondent (1)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated May 18, 2010, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on July 15, 2010. The parties were properly notified about the hearing. The claimant failed to participate in the hearing. Michael Collings participated in the hearing on behalf of the employer. Exhibit One was admitted into evidence at the hearing.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked for the employer as a valet attendant from September 13, 2005, to March 8, 2010. The claimant was informed and understood that under the employer's work rules, employees were required to submit to a drug test under certain circumstances, including when an employee is involved in an accident, and were subject to termination if they tested positive for drugs.

The claimant damaged the side mirror on a customer's vehicle while parking it on February 27, 2010. The claimant was required to submit to a drug test on February 27. There is no evidence as to whether the urine sample taken from the claimant was properly analyzed using an initial drug screen test and subsequent confirmatory test by a certified laboratory. There is no evidence that the sample was split.

On March 4, 2010, the drug screen coordinator for Alegent Health occupational health reported the claimant tested positive for THC (marijuana). The claimant was discharged by the employer on March 8, 2010, after it received the results of the drug test. There is no evidence that the employer notified the claimant in writing by certified mail, return receipt requested, of the results of the test and the right to request and obtain a confirmatory test of the second sample collected at an approved laboratory of the employee's choice.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether Engle was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code section 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent, or evil design. Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not misconduct within the meaning of the statute. 871 IAC 24.32(1).

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.

There is no evidence that there was an initial drug screen and a confirmatory test conducted using gas chromatography/mass spectrometry or comparably reliable analytical method by a certified laboratory as required by Iowa Code section 730.5-7-f(1).

In addition, 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 section 730.5-7-i. The employer also violated this section of the law.

Finally, under Iowa Code section 730.5-8, drug or alcohol testing is limited to the following reasons: (1) random testing, (2) drug or alcohol testing after completing of rehabilitation, (3) reasonable suspicion testing, (4) pre-employment, (5) federally required testing, and (6) investigating accidents in the workplace resulting in an injury to a person reportable under chapter 88 or resulting in damage of over \$1,000. In addition, reasonable suspicion includes evidence that the person caused an accident at work resulting in an injury to a person reportable under chapter 88 or damage of over \$1,000. Iowa Code chapter 88 (Occupational Health and Safety Act) requires the reporting of work-related injuries, other than minor injuries that require only first aid treatment. Consequently, the drug test done on February 27, 2010, violates Iowa Code section 730.5-8. There is evidence of any injury to a person or damage to property of over \$1,000.

Because the employer has violated Iowa law in testing the claimant, the positive drug test result does not disqualify the claimant from receiving unemployment insurance benefits.

DECISION:

The unemployment insurance decision dated May 18, 2010, reference 01, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/pjs