

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MILO L DLOUGHY II
Claimant

APPEAL NO. 07A-UI-07056-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALLEN HARRIS EXCAVATING CO
Employer

**OC: 06/10/07 R: 03
Claimant: Respondent (1)**

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Allen Harris Excavating Company (Harris) filed an appeal from a representative's decision dated July 9, 2007, reference 04, which held that no disqualification would be imposed regarding Milo Dlouhy's separation from employment. After due notice was issued, a hearing was held by telephone on August 6, 2007. Mr. Dlouhy participated personally. The employer participated by Jeff Harris, Operations Manager. Exhibits One through Eight were admitted on the employer's behalf.

ISSUE:

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

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Dlouhy was employed by Harris from August 1 until November 22, 2006 as a full-time laborer. He was discharged due to violations of the employer's drug policy.

Mr. Dlouhy sustained a work injury on August 21, 2006. As a result, he was required to have a drug screen. He tested positive for marijuana and, therefore, received a written warning. The warning advised that he would be tested for drugs again in 30 days and that any future violations would result in termination. Another drug screen was conducted on October 16. The results were negative but there was a notation that the specimen was diluted. No disciplinary action was taken against Mr. Dlouhy at that time because of the diluted specimen.

On October 30, Mr. Dlouhy underwent drug screening for a third time. The employer was notified on November 3 that he tested positive for marijuana metabolite. Mr. Dlouhy continued to work until notified of his discharge on November 22, 2006. He was not at any point provided notice by certified mail, return receipt requested, that he could have a split of his original specimens tested at a lab of his choosing. The positive drug test results were the sole reason for Mr. Dlouhy's discharge.

REASONING AND CONCLUSIONS OF LAW:

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). The employer's burden included establishing that the discharge was due to a current act of misconduct. 871 IAC 24.32(8). In the case at hand, the employer learned on November 3 that Mr. Dlouhy had tested positive for illicit drugs. However, he was not discharged until approximately three weeks later. The employer failed to establish justification for waiting three weeks to discharge. The employer's drug policy is clear and unambiguous. At least one other individual was discharged for violating the policy before Mr. Dlouhy. The employer did not present any viable reason for not discharging Mr. Dlouhy immediately after receiving the final drug test results on November 3. For the above reasons, the administrative law judge concludes that the employer's delay in discharging Mr. Dlouhy precludes considering the drug test results of November 3 as a current act of misconduct.

Even if the administrative law judge were to conclude that there was a current act, the employer's case still fails. When there is a confirmed positive drug test, an employer is required to give the employee notice by certified mail, return receipt requested, of the right to have a split of the original specimen tested at a lab of his choice. Iowa Code section 730.5(7)i. This requirement is a part of Iowa's drug testing law. Drug testing that does not comply with the requirements of the law cannot form the basis of a misconduct disqualification. See Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553, 557 (Iowa 1999).

After considering all of the evidence and the contentions of the parties, the administrative law judge concludes that the employer has failed to satisfy its burden of proving misconduct as that term is defined by law. While the employer may have had good cause to discharge, conduct that might warrant a discharge from employment will not necessarily support a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa 1983). For the reasons cited herein, benefits are allowed.

DECISION:

The representative's decision dated July 9, 2007, reference 04, is hereby affirmed. Mr. Dlouhy was discharged but disqualifying misconduct has not been established. Benefits are allowed, provided he satisfies all other conditions of eligibility.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/pjs