

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LOREN A HUNTER
Claimant

APPEAL NO. 10A-UI-01128-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALTER TRADING CORPORATION
Employer

OC: 12/13/09
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated January 11, 2010, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on March 2, 2010. The parties were properly notified about the hearing. The claimant participated in the hearing. Dawn Wolf participated in the hearing on behalf of the employer.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked full time for the employer as a driver from March 21, 2008, to December 8, 2009.

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 random drug tests and after a work-related accident, and were subject to termination if they tested positive for drugs for a second time after being given an opportunity for rehabilitation.

Pursuant to the policy, the claimant was required to submit to a post-accident drug test on March 30, 2009. A urine sample was properly taken from the claimant and properly analyzed using an initial drug screen test and subsequent confirmatory test by a certified laboratory. The analysis disclosed the presence of cocaine in violation of the employer's policy. The employer allowed the claimant to undergo treatment to avoid being discharged. The claimant understood that he would be discharged if he again tested positive for illegal drugs.

On December 3, 2009, the claimant was selected for a follow-up drug test. A urine sample was properly taken from the claimant. The sample was split to allow for retesting. It was properly analyzed using an initial drug screen test and subsequent confirmatory test by a certified laboratory. The analysis disclosed the presence of cocaine in violation of the employer's policy. He was contacted by a medical review officer who informed the claimant about the result of the

test and his right to have the split sample tested. He was not asked about any prescription or nonprescription drugs he had recently used or other medical information relevant to the test.

After the employer received the test result, it sent the claimant a letter on December 8, 2009, by Federal Express overnight mail informing him about the results of the drug test, he was discharged under the employer's policy, and he had the right to have a test conducted on the split sample. The letter did not state what the cost of that testing would be but stated that the claimant would have to pay for the test in advance. The letter was not sent by certified mail, return receipt requested. The claimant received the letter but did not request that the split sample be tested.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant 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.

Iowa Code section 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. An employee has seven days to request a second test. Iowa Code section 730.5(7)(i)(1)

The employer has not complied with § 730.5(7)(i)(1) because the notice was not sent by certified mail, return receipt requested, as required by the statute and the Iowa Supreme Court in Harrison v. Employment Appeal Board and the cost of the test was not spelled out in the letter. As a result of this noncompliance, the claimant is not subject to disqualification.

DECISION:

The unemployment insurance decision dated January 11, 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