

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DANNY D MONTGOMERY
Claimant

APPEAL NO: 09A-UI-15975-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 10/04/09
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Danny D. Montgomery (claimant) appealed a representative's October 22, 2009 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Tyson Fresh Meats, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 1, 2009. The claimant participated in the hearing. The employer's representative received the hearing notice and responded by calling the Appeals Section on November 30, 2009. The representative indicated that Ron Wood would be available at the scheduled time for the hearing at a specified telephone number. However, when the administrative law judge called that number at the scheduled time for the hearing, Mr. Wood was not available; therefore, the employer did not participate in the hearing. Based on the evidence, the arguments of the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on February 26, 2009. He worked full time as a sanitation worker at the employer's Waterloo, Iowa plant. His last day of work was August 3, 2009. The employer discharged him on that date. The reason asserted for the discharge was violation of the employer's drug policy.

On July 28 the claimant slipped and fell at work, but did not immediately seek medical attention. He returned to work on July 29. When he complained of continued pain to his supervisor, he was taken to the employer's doctor. When he returned from the doctor, the employer informed him that he was going to need to submit to a drug test. The test was going to be administered by an employee other than the nurse in the employer's office. It was unknown whether that person was certified technician or whether the type of screening was of a type authorized by Iowa Code section 730.5. The claimant declined. His primary reason for declining was that after he had fallen on July 28 he had taken some old prescription medication for pain for which

his prescription had expired, so he assumed the test would be “positive.” The employer informed him that since he was refusing to submit to the test, it would be treated as if he had a positive test, and therefore he was discharged. The employer previously had allowed a person with a positive drug test to submit to rehabilitation rather than discharge, but when the claimant inquired, the employer would not allow him to do this.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant’s employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a; 871 IAC 24.32(1)a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

The reason cited by the employer for discharging the claimant is violation of the employer’s drug and alcohol policy through a positive drug test. In order for a violation of an employer’s drug or alcohol policy by a positive drug or alcohol test to be disqualifying misconduct, the test and the policy must be shown to be in compliance with Iowa’s drug and alcohol testing laws. Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003); Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553, 558 (Iowa 1999). The Eaton court said, “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 statute requires certain standards be followed in the sample collection and testing process; the employer has not shown that its procedures satisfy these requirements. The statute further requires that the policy have a standard disciplinary result for a person who is deemed to have a positive test, which also has not been shown to be the case. The employer has not shown it has substantially complied with the drug testing provisions. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant’s actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's October 22, 2009 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs