

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARTIN H MAY
Claimant

APPEAL NO. 12A-UI-06500-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ADVANCED DRAINAGE SYSTEMS INC
Employer

OC: 04/29/12
Claimant: Respondent (1)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated May 21, 2012, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on June 27, 2012. The parties were properly notified about the hearing. The claimant participated in the hearing. Andy Richardson participated in the hearing on behalf of the employer with a witness, Thomas Kowal. Exhibits One through Four were 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 yard loader from September 19, 2011, to May 1, 2012. He 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 randomly selected, and were subject to termination if they tested positive for drugs. The drug testing policy does not specify the drugs employee will be tested for. The employer does not have an employee assistance program or a resource file with information about obtaining assistance for drug or alcohol problems.

Pursuant to the policy, the claimant was required to submit to a random drug test on April 23, 2012. A urine sample was properly taken from the claimant and analyzed using an initial drug screen test and subsequent confirmatory test by a certified laboratory. The urine sample was split to allow a test to be conducted on the second sample. The test results were positive for amphetamines.

The employer's medical review officer informed the claimant about positive test results for amphetamines and that he would have the opportunity to present information from his doctor or pharmacy about any legal drugs he was taking to explain the positive test result. The claimant did not provide any information and the medical review officer then verified the positive test result for amphetamines.

The employer verbally notified the claimant that he was being discharged for testing positive for an illegal drug. The plant manager informed the claimant verbally that he could have the split sample tested at his own expense and that he would be reimbursed for the expense if the second sample was negative, but he did not tell the claimant the cost of the test.

A certified letter was never sent to the claimant notifying him about the results of the drug test, his right to obtain a second confirmatory test of the split sample, or the cost of the drug test.

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 § 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 drug or alcohol testing performed in violation of Iowa law. *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.

The question then is whether the employer complied with the drug-testing procedures of Iowa Code § 730.5.

One requirement is for the employer to notify the employee in writing by certified mail, return receipt requested, "of the results of the test, the employee's 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 by the employee to the employer for reimbursement of expenses concerning the test. The fee charged an employee shall be an amount that represents the costs associated with conducting the second confirmatory test, which shall be consistent with the employer's cost for conducting the initial confirmatory test on an employee's sample." Iowa Code § 730.5-7-i(1). The employer did not notify the employee in writing by certified mail, return receipt requested, of the results of the test, and his right to request and obtain a confirmatory test of the second sample collected.

The law also provides that "If an employer does not have an employee assistance program, the employer must maintain a resource file of alcohol and other drug abuse programs certified by the Iowa department of public health, mental health providers, and other persons, entities, or organizations available to assist employees with personal or behavioral problems. The employer shall provide all employees information about the existence of the resource file." Iowa Code § 730.5-9-c(2). The employer was in violation of this section because it does not have an employee assistance program or resource file.

Finally, the law provides that the employer shall provide an employee with a list of the drugs to be tested. Iowa Code § 730.5-7-c(2). There is no evidence that this was ever done.

During the hearing, the claimant admitted that an employee had given him some pills that he thought were a caffeine-type drug but later found out were amphetamines. But the employer's decision to discharge the claimant was based on his positive test result not any admission of drug use. The claimant is not subject to disqualification because the testing procedures used by the employer did not comply with state law. See *Eaton*, 602 N.W.2d at 558.

DECISION:

The unemployment insurance decision dated May 21, 2012, 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/css