

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JORDAN ESTEP
Claimant

APPEAL NO: 11A-UI-13832-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

L A LEASING INC
Employer

OC: 01-30-11
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 14, 2011, reference 05, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on November 15, 2011. The claimant participated in the hearing. Chad Baker, work comp administrator, and Sharon Haggdorn, branch manager, participated in the hearing on behalf of the employer. Employer's Exhibits One and Two were admitted into evidence.

ISSUE:

The issue is whether the claimant was discharged for work-related misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time laborer for Sedona Staffing last assigned to Twin City Tanning from May 31, 2011 to August 13, 2011. He sustained an injury to his finger August 13, 2011, but refused medical treatment while at work. When he got home, his wife insisted he see a physician and they went to the hospital. He reported for work Monday, August 15, 2011, and his supervisor's supervisor told him he needed a splint and asked why he did not report the injury. The claimant stated his supervisor told him to tell the doctor he cut his finger fishing and his supervisor's supervisor told him he had to go to Sedona. He went to Sedona and was instructed to go to Allen Occupational Health and submit to a drug screen. He went to Allen Occupational Health, where a drug test was administered. The conditions were sanitary and private and the sample was split. Sedona had told him to come back if he wanted light duty work and the claimant returned and began working light duty for Sedona August 18, 2011. On August 19, 2011, the medical review officer called the claimant and notified him that he tested positive for marijuana. The medical review officer then called the employer and gave them the same information. The claimant went into the employer's office and stated he was notified of the positive drug test and the employer explained that was considered a self-termination and the claimant left. The employer sent the claimant a certified letter August 19, 2011, stating he tested positive and had the right to a confirmatory test of the second sample at an approved lab

of his choice at his own expense (Employer's Exhibit Two). The employer has a written drug and alcohol testing policy the claimant signed May 31, 2011 (Employer's Exhibit One).

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for disqualifying job misconduct.

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand 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 to be deemed misconduct within the meaning of the statute.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for violation of the employer's drug and alcohol policy due to his positive drug test for marijuana. Iowa Code section 730.5 sets forth the rules by which a private company may screen its employees for use of illegal drugs. The employer has a written drug testing policy per Iowa Code Section 730.5(9)(b) and tested the claimant following a work-related accident. The claimant was advised of the drugs to be tested and was given the opportunity to advise the medical review officer of any drugs he was taking that might have affected the outcome. Iowa Code Section 730.5(7)(c)(2). The test was performed during the workday at the medical office used

by the employer and split samples were taken at the time of collection. Iowa Code sections 730.5(6) and (7)(a-c). A medical review officer reviewed and interpreted the confirmed positive test result and notified the claimant of the positive results before reporting the results to the employer; Iowa Code section 730.5(7)(g). The medical review officer reported that no medications the claimant was taking could have given a positive test result for marijuana. The claimant was notified by certified mail, return receipt requested of the positive result and his right to obtain a confirmatory test of the secondary sample. Iowa Code sections 730.5(7)(i)(1) and (2). He was advised if he wanted to proceed to test the secondary sample, he needed to notify the human resources manager by mail. This was not done and the human resources manager was not aware of any additional drug test. The employer has met the requirements of Iowa Code section 730.5. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits must be denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The October 14, 2011, reference 05, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

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