

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CORNELL MILLER
Claimant

APPEAL NO. 07A-UI-02161-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOWA-ILL TAYLOR INSULATION INC
Employer

**OC: 07/23/06 R: 04
Claimant: Appellant (1)**

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated February 27, 2007, reference 03, that concluded he was discharged for work-connected misconduct. A telephone hearing was held on March 28, 2007. The parties were properly notified about the hearing. The claimant participated in the hearing. Darren Parchert participated in the hearing on behalf of the employer. Exhibits One and Two 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 an asbestos abatement worker from February 18, 2005, to February 6, 2007. 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 pre-placement testing before being placed to work at certain work locations, and were subject to termination if they tested positive for drugs on two occasions. On a first positive test for illegal drugs, an employee was required to undergo a substance abuse evaluation at facility selected by the employer and to successfully complete treatment for drug abuse if such treatment is determined necessary during the evaluation. Employees who fail to comply with the evaluation and treatment requirements are subject to termination.

Pursuant to the policy, the claimant was required to submit to a drug test on January 5, 2007. 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 opiates in the claimant's system at a level which would demonstrate the claimant had used illegal drugs in violation of the employer's policy. The claimant was notified in writing about the results of the drug test and his right to have the split sample of his urine tested at his expense.

Based on the policy, the claimant was required to undergo an evaluation and was informed in writing that the evaluation was on January 23, 2007. The claimant failed to report for the

evaluation because he forgot about it. Later that day the claimant called the treatment center and was told that he could not be scheduled for an evaluation for two or three weeks. The claimant called a different treatment center and scheduled an evaluation for February 7, 2007. He did not notify the employer about missing his appointment or rescheduling the appointment because he did not want the employer to know that he had missed the appointment.

On February 6, 2007, the safety director contacted the original treatment center because he had not received the results of the evaluation yet. He was told that the claimant had missed the appointment and had not called in advance to say he would not be there. When he confronted the claimant, he told the safety director that he had an appointment for the evaluation the next day. The safety director discharged the claimant on February 7, 2006, for missing the evaluation appointment and not notifying the employer.

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.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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.

The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing of the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. The preponderance of the evidence establishes the employer's policies and the testing of the claimant complied with chapter 730. The claimant's violated a known work rule by failing to undergo the evaluation at the facility chosen by the employer. The claimant intentionally failed to notify the employer that he had missed the appointment and was hoping to get the evaluation done at another treatment center before the employer noticed he had missed his appointment. This was a willful and material breach of the duties and obligations to the employer and a substantial disregard of the standards of behavior the employer had the right to expect of the claimant. Work-connected misconduct as defined by the unemployment insurance law has been established in this case.

DECISION:

The unemployment insurance decision dated February 27, 2007, reference 03, is affirmed. The claimant is disqualified from receiving unemployment insurance benefits until he has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/css