

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

JASON A BROWN
1772 180TH AVE
OSCEOLA IA 50213-8251

DES MOINES AUTOMOTIVE PARTS
COMPANY
PO BOX 614
DES MOINES IA 50303

Appeal Number: 06A-UI-01656-RT
OC: 01-29-06 R: 03
Claimant: Respondent (5)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Des Moines Automotive Parts Company, filed a timely appeal from an unemployment insurance decision dated February 7, 2006, reference 02, allowing unemployment insurance benefits to the claimant, Jason A. Brown because he was laid off for a lack of work. After due notice was issued, a telephone hearing was held on February 28, 2006, with the claimant participating. Jami Schnoebelen, General Manager and former Vice President, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full time yard man from November 14, 2005 until he was separated from his employment effective January 13, 2006. Effective January 13, 2006, Alter Trading purchased the business and initiated a pre-employment drug test as part of its physical for all employees. All employees of the employer would have had continued employment under the new owner pending satisfactory completion of the physical and drug test. However, the claimant's drug test result showed positive for THC and the claimant was not permitted to continue to work for the employer under the new owner. The employer, under the new owner, has a written drug testing policy providing for, among other things, pre-employment drug testing. Such a test was administered to the claimant. A urine sample was taken from the claimant at Lab One in Des Moines, Iowa. The sample was split. The test on the first half of the sample showed positive as noted above. The claimant was notified of the positive drug test by telephone call with the employer's medical review officer. At that time the claimant was told of the positive drug test and that he had the right to a confirmatory test. The claimant did not remember whether he was told he had seven days with which to request a confirmatory test. The claimant was told that he could have the confirmatory test on the second half of the sample done at a lab of his choosing. Although the medical review officer did not specify the approximate cost of the confirmatory test the claimant was told by the employer's witness, Jami Schnoebelen, General Manager and previously Vice President, that the test would cost approximately \$60.00. However, the claimant received nothing in the mail from the employer or anyone else informing him of the test results or the right to a confirmatory test or any of the other rights set out above. The employer did not send such a letter to the claimant. Pursuant to his claim for unemployment insurance benefits filed effective January 29, 2006, the claimant has received unemployment insurance benefits in the amount of \$1,048.00 as follows: \$262.00 per week for four weeks from benefit week ending February 4, 2006 to benefit week ending February 25, 2006.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

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 first issue to be resolved is the actual character of the separation. The claimant was working for the employer when another company purchased the employer effective January 13, 2006. Although the claimant could have remained employed and would have remained employed, the claimant was not allowed to remain employed because of a positive drug test required by the new employer. Under these circumstances, the administrative law judge concludes that the claimant was in effect discharged effective January 13, 2006 when the new employer took over from the old employer. The claimant could have and would have continued to work for the employer had he been permitted to do so but he was not. Since he was not permitted to do so the administrative law judge concludes that the separation was, in effect, a discharge and it was effective January 13, 2006. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6 (2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct.

The only allegation of disqualifying misconduct here was a positive drug test pursuant to the employer's drug testing policy. The employer has a drug testing policy providing for pre-employment drug tests and physicals. The administrative law judge notes that a new employer had purchased the business from the old employer and initiated a pre-employment drug test of all employees. There is no evidence that the drug test administered on the claimant and/or the employer's drug testing policy is required by any federal rule or regulation or law. Accordingly, the administrative law judge concludes that the employer's drug testing policy and, in particular, the claimant's drug test, must comply with Iowa law namely Iowa Code section 730.5.

In Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553 (Iowa 1999), the Iowa Supreme Court determined that in order for a positive drug test to be misconduct sufficient to disqualify someone from unemployment insurance benefits, it had to meet the requirements of the Iowa Drug testing law at Iowa Code section 730.5 and that such drug tests would be scrutinized carefully to see that the drug tests complied with Iowa law. This decision was expanded by a recent case, Andrew Harrison v. Employment Appeal Board and Victor Plastics, Inc., 659 N.W.2d 581 (Iowa 2003). In that decision the Supreme Court avoided determining whether "strict" or "substantial" compliance with Iowa Code section 730.5 was sufficient in order to disqualify someone from receiving unemployment insurance benefits for a positive drug test, but the Court determined that written notice of a positive drug test must be made by certified mail return receipt and the notice must inform the employee of his or her right to have a second confirmatory test done at a laboratory of his or her choice and it must tell the employee what the cost of that test will be. The written notice must further inform the employee that he or she has seven days to request a confirmatory test or second test and that the cost of that test will be reimbursed to the employee if the second or confirmatory test is negative. That notice was not sent to the claimant in that case. That notice was also not sent to the claimant in this case.

The evidence establishes that the claimant herein was informed of the positive drug test and the right to a confirmatory test and perhaps even that he had seven days to request a confirmatory test and that he could have the test done at a lab of his choosing but this was not done in writing let alone by a letter, let alone certified mail return receipt requested. As is clear from Harrison, the employer's drug test performed on the claimant here does not meet the requirements set out in Harrison or Iowa Code section 730.5. Because the administrative law judge concludes here that the employer's drug test on the claimant must fail for non-compliance with Iowa Code section 730.5 and Harrison as noted above, the administrative law judge does not believe that it is necessary to further inquire into other requirements of Iowa Code section 730.5 pertaining to a drug test such as the establishment of an awareness program, proper training for supervisory personnel, sample collection under sanitary conditions, the opportunity to provide information by the claimant relevant to the test, appropriate chain of custody for the sample taken from the claimant. Accordingly, the administrative law judge concludes that the employer's drug testing policy and, in particular, the drug test conducted on the claimant fails to comply with Iowa Code section 730.5 and Harrison and there is no evidence that the drug test administered to the claimant was required by any federal rules or regulations that might involve other less restrictive drug testing requirements. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant or appropriate compliance with Iowa Code section 730.5 and Harrison, so as to warrant the claimant's disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided he is otherwise eligible.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal

to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,048.00 since separating from the employer herein on or about January 13, 2006 and filing for such benefits effective January 29, 2006. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of February 7, 2006, reference 02, is modified. The claimant, Jason A. Brown, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was effectively discharged on January 13, 2006 but not for disqualifying misconduct. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

kkf/tjc