

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KELVIN W MCEWEN
Claimant

APPEAL NO. 16A-UI-01462-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

TWINN CITY TANNING WATERLOO LLC
Employer

OC: 01/10/16
Claimant: Appellant (2)

Section 96.5-2-a – Discharge
Section 730.5 – Private Sector Drug Testing

STATEMENT OF THE CASE:

Kelvin McEwen, the claimant, filed a timely appeal from a representative's decision dated January 28, 2016, reference 01, which denied unemployment insurance benefits finding that the claimant was discharged from work on December 16, 2015 for conduct not in the best interest of the employer. After due notice was provided, a telephone hearing was held on February 25, 2016. Claimant participated. Participating on behalf of the claimant was Mr. Benjamin Roth, Attorney at Law. The employer participated by Mr. Rusty Truax, Acting Plant Manager. Claimant's Exhibit One was admitted into the hearing record.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Kelvin McEwen was employed by Twinn City Tanning Waterloo LLC from September 28, 2015 until December 16, 2015 when he was discharged from employment for failing a drug testing screen. Mr. McEwen was employed as a full-time production worker and was paid by the hour. His immediate supervisor was Richard Peterson.

On or about December 15, 2015, Mr. McEwen, the claimant, reported to the employer that he had a "rash" on his arm. Mr. McEwen was referred to Allen Hospital so that the rash could be examined. Because the claimant had reported a medical issue to the employer, the employer required that the claimant undergo a drug testing while at the Allen Hospital facility that day. After undergoing drug testing, Mr. McEwen was later contacted via telephone by the medical doctor employed by the Allen Hospital facility and notified verbally about the test results for two controlled substances that were identified in the company's written drug testing policy. The employer also notified Mr. McEwen of the positive test results verbally in a meeting with Mr. Truax. The claimant was not provided any information at that time of his right to request or

obtain a confirmatory test of a second sample at the laboratory of his choice or that any fees that he would be required to pay for the retesting would be reimbursed by the company if the confirmatory tests were not positive. Claimant also was not notified that he had seven days during which to request a second confirmatory test.

The company's written drug testing policy provides for drug testing if the employer concludes that the performance of the employee may have been a contributing factor to an accident or injury or if there has been damage to company property in an amount reasonably estimated to exceed \$1,000.00. Because Mr. McEwen had reported the rash on his arm to the company, the employer believed that unidentified conduct on the part of the claimant may have been a contributing factor. The incident was also reported to OSHA.

When Mr. McEwen was being discharged personally by Mr. Truax, he made admissions of private recreational use of the substances identified in the positive test results but maintained that he had not been under the influence of any controlled substance while on company property or performing his duties.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

In discharge cases the employer has the burden of proof to establish disqualifying conduct on the part of a claimant. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

Iowa Code section 730.5 provides the authority under which a private sector employer doing business in Iowa may conduct drug or alcohol testing of employees. In Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553 (Iowa 1999), the Supreme Court of Iowa considered the statute and held "that an illegal drug test cannot provide the basis to render an employee ineligible for unemployment compensation benefits." Thereafter, in Harrison v. Employment Appeal Board, 659 NW 2d 581 (Iowa 2003), the Iowa Supreme Court held that where an employer had not complied with the statutory requirement for the drug test, the test could not serve as a basis for disqualifying a claimant for benefits. In the present case, although the claimant had not claimed that he had been injured at work, but only had a "rash" on his arm, the employer, for reasons that are unclear, concluded that Mr. McEwen's performance at work may have been a contributing factor for the rash on his arm. Because the employer concluded that an OSHA report was required, Mr. McEwen was sent for drug testing.

The evidence in the record also establishes the employer did not comply with the requirements of Section 730.5, Iowa's drug testing statute, or the company's own written drug testing policy in the manner that Mr. McEwen was informed of the positive test results and/or his right to request and obtain a confirmatory test of a second sample in an approved laboratory of his choice within seven days or that the fee payable by Mr. McEwen would be reimbursed if the confirmatory test was not positive.

Section 730.5 further specifically requires that the employer shall notify the employee in writing by certified mail, return receipt requested, of positive test results and the employee's right to request or obtain a confirmatory test of the second sample in an approved laboratory of the employee's choice and that the fee payable will be reimbursed by the company if the confirmatory test is negative.

Because the employer has not complied with Section 730.5 of the Iowa's drug testing statute, the drug testing was not authorized by law and cannot serve as a basis for disqualifying Mr. McEwen for unemployment insurance benefits.

Accordingly, the administrative law judge concludes that the claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

DECISION:

The representative's decision dated January 28, 2016, reference 01, is reversed. Claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs