

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES M ROYE
Claimant

APPEAL NO. 06A-UI-11240-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

JELD-WEN INC
Employer

OC: 12/25/05 R: 02
Claimant: Appellant (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

James M. Roye (claimant) appealed a representative's November 16, 2006 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Jeld-Wen (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 6, 2006. The claimant participated in the hearing. Judi Gentry of TALX Employer Services appeared on the employer's behalf and presented testimony from three witnesses: Brad Harris, Nicole Smith, and Jeff Nagle. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on March 18, 2002. He worked full time as a laborer at the employer's Grinnell, Iowa, vinyl window manufacturing facility. His last day of work was September 19, 2006. The employer discharged him on October 11, 2006. The stated reason for the discharge was failing to participate in a substance abuse treatment program after agreeing to do so after a positive drug test.

On or about Friday, September 15, law enforcement officers made a traffic stop involving the claimant and ultimately arrested and charged the claimant with possession of marijuana. Upon his return to work the next week, rumor of his arrest spread among the workforce and ultimately to management. As a result, on Tuesday, September 19, after verifying the information of the claimant's arrest and charge with law enforcement authorities, the employer determined that the fact of the arrest and charge constituted a "report of . . . drug use provided by a reliable and credible source" and therefore constituted a reasonable suspicion that the claimant had used drugs in violation of the employer's drug policy, of which the claimant was on notice. Therefore, the employer determined that the claimant was subject to reasonable suspicion testing under its policy.

The claimant was taken to a local medical facility where a urine sample was collected under sanitary and private conditions, and a split portion of the sample was segregated. The employer's drug policy had advised the claimant of the substances for which the sample would be tested. He was

advised that he would remain off work until the test results were returned from the certified diagnostic lab to which the sample was sent for analysis. On September 21 the employer received a report from the laboratory, indicating the sample was positive for marijuana. On September 22 the employer contacted the claimant, who acknowledged he was aware of the test results. A meeting was arranged for September 25 to discuss the claimant's options.

The claimant was given written notice he had the right to have the split portion of the sample retested at his own expense; on September 25 he signed a waiver of that right. He was advised that he had two options under the employer's drug policy: he could either agree to enter into substance abuse treatment as directed by the employer's designated case manager, or he would be discharged. He signed an agreement to enter into the substance abuse treatment. The employer advised him that under the treatment program, he would be allowed to return to work once he could provide a negative test result, and that the first retest would be after seven days. The claimant responded that he would be "unable to do that," which the employer took as meaning that the claimant was acknowledging that he believed there would still be sufficient drug metabolites in his system so as to cause a positive test for at least another seven days. In fact, the claimant was referring to the fact that he would not be available to participate in treatment or retesting in the seven days after September 25.

Prior to September 19, the claimant had requested time off from September 29 until October 9 to take a trip to California to discuss some issues with his sister regarding his mother's care. He only had approximately two days of paid time off available to him, however, so he was requesting the additional time off as unpaid leave. His immediate supervisor had initially indicated it would probably not be a problem, but ultimately the request for the unpaid time off was not authorized. However, there was no formal notification given to the claimant that his request had been denied.

During the September 25 meeting, the claimant made reference to his upcoming time off, indicating that it could delay his entry into the treatment program, to which Mr. Harris, the production manager, responded that delaying the beginning of the treatment program would not be acceptable. No further specifics were discussed during that meeting as to the time table for the treatment program, but only that the claimant would be contacted by the case manager to set up his entry into the program.

The case manager did contact the claimant on or about September 26 seeking to start the treatment program immediately; the claimant responded that he was not going to start the program until after returning from his vacation October 9. The case manager relayed this information to the employer, and the claimant received at least one message from Mr. Harris before leaving for vacation that he needed to contact Mr. Harris immediately, as the employer was expecting the claimant to begin the treatment program immediately. The claimant did not return messages to the employer or the case manager before leaving for California on September 30.

The claimant returned to Iowa on Saturday, October 7. He had a party at his home that evening. He did not return the employer's or the case manager's calls at that time, nor any time the week of Monday, October 9, his announced "return from vacation" date. When the claimant had not responded or taken action to enter treatment by October 11, the employer drafted a letter advising the claimant his employment was terminated for failure to comply with the drug treatment agreement; the employer mailed that letter to the claimant either late October 12 or early October 13, by which time the claimant still had not made a contact to the employer or the case manager regarding beginning his treatment program.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code §96.5-2-a.

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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

In order for a violation of an employer's drug or alcohol policy to be disqualifying misconduct, it must be based on a drug test performed in compliance with Iowa's drug testing law, Iowa Code §730.5, as well as being in compliance with the policy itself. Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553, 558 (Iowa 1999). The administrative law judge extends that analysis to mean that in order for a violation of a drug treatment agreement which was the result of a drug test to be disqualifying misconduct, it is still necessary that the underlying drug test was in compliance with the law. The claimant has sought a determination from the administrative law judge that the employer's drug test was not valid, as he believes that the basis for the drug test, the traffic stop under which he was initially charged for drug possession, was unconstitutional as without probable cause, and that the drug testing statute itself is unconstitutional in providing for drug testing for reasonable suspicion on the basis of an assertedly unconstitutional arrest. No determination has been made by any district or appellate court regarding the constitutionality of the arrest. The administrative law judge in this unemployment insurance benefit determination case is without jurisdiction to collaterally question or make a determination on the constitutionality of the traffic stop in the criminal proceeding. Until or unless reversed by a court of general jurisdiction, a statute is presumed to be constitutional. Iowa Code § 4.4. The administrative law judge notes that any determination by a court of competent jurisdiction that the traffic stop itself was unconstitutional may not automatically result in a conclusion that the employer could not have relied on the report of the arrest as the basis for its test under § 730.5(1)(i)(3).

The administrative law judge therefore concludes that the employer complied with the drug testing law and its own policies. A preponderance of the evidence establishes the claimant violated the employer drug policy, and therefore violation of the resulting drug treatment agreement could be disqualifying misconduct. Even if the claimant's failure to enter into treatment immediately in lieu of departing on his trip can be attributed to a miscommunication or misunderstanding, the claimant knew the employer was expecting him to begin treatment immediately, and at the least his failure to promptly report for treatment upon his return from vacation shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

DECISION:

The representative's November 16, 2006 decision (reference 01) is affirmed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of October 11, 2006. This disqualification continues until the claimant has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw