

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOE H BROOKS
Claimant

TPI IOWA LLC
Employer

APPEAL 17R-UI-10107-JCT
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 07/30/17
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct

Iowa Code § 730.5 – Private Sector Drug-free Workplaces

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 17, 2017, (reference 01) unemployment insurance decision that denied benefits. A hearing was first scheduled for September 8, 2017. The claimant did not appear and his appeal was dismissed. Upon successful request for reopening, the Employment Appeal Board remanded the matter for a second hearing, to allow both parties to participate. The parties were properly notified about the hearing. A telephone hearing was held on October 19, 2017. The claimant participated personally. The employer participated through Danielle Williams, senior human resources coordinator.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, 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 disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time in production and was separated from employment on July 24, 2017, when he was discharged for allegedly testing positive for alcohol.

The employer has a written policy that allows for drug and alcohol screening. The employer did not provide a copy of the policy for hearing, but states it conducts breathalyzer testing for alcohol on the basis of “reasonable suspicion” if two or more employees observe an employee demonstrating behavior consistent with impairment. The employer did not furnish a handbook acknowledgement for the claimant or written statements from other employees. The only employer witness, Ms. Williams, did not attend the alcohol screening and was not a participant in collecting or analyzing the sample. The test results were not furnished for the hearing

On July 16, 2017, the claimant acknowledged he had had consumed alcohol until 5:00 a.m. after his shift ended at 11:00 p.m. The claimant was scheduled to work at 3:00 p.m. on July 17, 2017. The claimant did not eat, but showered and brushed his teeth before his shift began. He also drank a Red Bull and applied Nautica cologne. The claimant denied being drunk or feeling impaired from the alcohol consumed 10 hours before, when he arrived to work, and did not consume any alcohol at work.

Upon entering the facility for his shift, and before having access to any member of management, the claimant was requested to go to the management office. Reggie McDade informed the claimant he smelled of alcohol and needed to be tested for alcohol. Ms. Williams reported that Scott Gemmell was the second witness to the reasonable suspicion test, but according to the claimant, he had no contact with Mr. Gemmell the day of the test.

According to the claimant, several employees entered the management office, trying to assist with the administration of the breathalyzer test, because management was struggling to administer it. When the claimant took the test minutes later, the breathalyzer registered a .158. He requested a second test. There was no follow-up or confirmatory test. The employer then sent the claimant home, allowing him to drive himself, even though he had reportedly failed a drug screening test. The next day, the claimant was called by Reggie McDade and told the employer it was looking into places for the claimant to get help. The employer initially told the claimant if he did fail, the employer would assist in him seeking help, but he was provided an option or assistance for alcohol or substance abuse. On July 24, 2017, the claimant was notified of his discharge. The claimant opined he was targeted for testing because days before, the employer had employees go on strike, and the claimant was perceived as "rallying the troops" because he had talked to other employees about starting a union.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

Iowa Code § 730.5 allows drug testing of an employee if, among other conditions, the employer has "probable cause to believe that an employee's faculties are impaired on the job." Iowa Code § 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing. Iowa Code § 730.5(7)(i)(1) mandates that an employer, upon a confirmed positive drug or alcohol test by a certified laboratory, notify the employee of the test results by certified mail return receipt requested, and the right to obtain a confirmatory test before taking disciplinary action against an employee. Upon a positive drug screen, Iowa Code § 730.5(9)(g)

requires, under certain circumstances, that an employer offer substance abuse evaluation and treatment to an employee the first time the employee has a positive drug test. The Iowa Supreme Court has held that an employer may not “benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits.” *Eaton v. Iowa Emp’t Appeal Bd.*, 602 N.W.2d 553, 557, 558 (Iowa 1999).

In this case, the claimant was discharged after reportedly exhibiting effects of alcohol consumption on July 17, 2017. The claimant denied being under the influence and had quit drinking ten hours before his shift. The two individuals who allegedly observed the claimant exhibit signs of impairment did not attend the hearing or offer a written statement. Ms. Williams had no information about the testing and did not observe the claimant the day of his testing. It is further unclear from the evidence presented why the claimant was allowed to drive home after testing positive, and why he was assured he would be offered rehabilitation before discharge by Mr. McDade, but then was discharged without a chance to receive assistance.

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep’t Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. 871 IAC 24.32(4). When it is in a party’s power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party’s case. *Crosser v. Iowa Dept. of Public Safety*, 240 N.W.2d 682 (Iowa 1976). Mindful of the ruling in *Crosser, id.*, and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant’s recollection of the events is more credible than that of the employer.

Based on the evidence presented, the employer failed to establish that it has a policy outlining the equipment and procedures to be used in testing, did not conduct a confirmatory breath test, and did not offer a rehabilitation option after the first positive test according to the strict and explicit statutory requirements. Thus, the employer cannot use the results of the drug screen as a basis for disqualification from unemployment insurance benefits. Misconduct has not been established. Benefits are allowed.

Nothing in this decision should be interpreted as a condemnation of the employer’s right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant’s conduct leading to separation was misconduct under Iowa law.

DECISION:

The August 17, 2017, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn