BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

SHAWN E LYONS	:	
	:	**HEARING NUMBER:** 11B-UI-04000
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
TRINITY STRUCTURAL TOWERS	:	

Employer.

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A, 96.3-7

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The claimant appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Shawn Lyons (Claimant) worked for Trinity Structural Towers (Employer) as a full-time welder from April 5, 2010 until he was fired on February 21, 2011. (Rec. at 6:18-6:47; 9:36-10:10). The Employer has a drug use policy, and a drug testing policy. (Rec. at 7:13-18; Ex. 1). The drug testing policy is not supplied to the employees, nor are the employees allowed to read the policy. (Rec. at 7:20-37). The Claimant was subjected to a random drug test on February 16, 2011. (Rec. at 7:10-13; 10:41-11:11). He was terminated because the sample allegedly came back out of temperature. (Rec. at 7:10; 7:43-52; 10:21-25; 11:30-40). This was the sole reason for the discharge. (Rec. at 8:26-29). The Employer does not fall under federal drug testing mandates. (Rec. at 9:11-16).

REASONING AND CONCLUSIONS OF LAW:

Misconduct Standards: Iowa Code Section 96.5(2)(a) (2011) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
>
> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." Huntoon v. Iowa Department of Job Service, 275 N.W.2d, 445, 448 (Iowa 1979).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

In this case the Claimant is accused of adulterating a drug test. Nothing in the Code states that testing positive for drugs is automatically disqualifying under the Employment Security Law. That determination is one made by Iowa Workforce Development and the Employment Appeal board on a case-by-case basis. The question in each case is whether the willful and wanton disregard of the employer's interests has been shown. In cases where a drug test is refused, or adulterated, the issue is one of refusing an employer's directive – of insubordination.

Continued failure to follow reasonable instructions constitutes misconduct. *See Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. *See Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The courts must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. *See Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

Here the Iowa Code makes it illegal to terminate someone in violation of Iowa Code §730.5. Where an employer requires an employee to take a drug test that requirement is not legal if it does not comply with §730.5. An employer thus may not terminate someone who refuses to take (by word, or by the action of adulteration) a test that does not comply with §730.5. If it were otherwise employer could, willy-nilly, require employees to urinate in a cup in front of the whole job site and fire anyone who refuses. The question in this case thus is whether the Claimant was being required to comply with a legal request. The order to undergo the test must be a lawful if refusal of the order, or defiance of the order through tampering, is to be misconduct.

Random Testing: We have no doubt that having an adulterated test result could constitute disqualifying misconduct. But the Iowa Supreme Court has ruled that an employer cannot establish disqualifying misconduct based solely 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). 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. In recognition of the importance of drug testing compliance in unemployment cases the Code allows the test result to be considered in unemployment cases even though generally the results are to be confidential. Iowa Code §730.5(13)(d)(1). Thus we must examine Iowa's drug testing statute to see if the Employer has complied with its requirements.

The Board is cognizant of the fact that the Board has twice before authorized deviation from the literal terms of Iowa Code §730.5 and on both occasions been reversed. Yet it is also true that the Iowa Supreme Court has now ruled that substantial compliance with Iowa Code §730.5 is sufficient. *Sims v. NCI Holding Corp.*, 759 N.W.2d 333 (Iowa 2009). "Substantial compliance is said to be compliance in respect to essential matters necessary to assure the reasonable objectives of the statute." *Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 338 (Iowa 2009)(quoting *Superior/Ideal, Inc. v. Bd. of Review*, 419 N.W.2d 405, 407 (Iowa 1988)). *Sims* ruled that substantial compliance is sufficient to satisfy the notice provision of Iowa Code §730.5(7)(i). We assume, without deciding, that substantial compliance with all provisions of §730.5 is all that is required. Still we are convinced that even under this standard the Employer has not complied with the requirements of the Code.

Iowa Code 703.5(9) governs the Employer's policies and states:

> 9. Written policy and other testing requirements.
>
> a. (1) Drug or alcohol testing or retesting by an employer shall be carried out within the terms of a written policy **which has been provided to every employee subject to testing, and is available for review by employees and prospective employees**. If an employee or prospective employee is a minor, the employer shall

provide a

> copy of the written policy to a parent of the employee or prospective employee and shall obtain a receipt or acknowledgment from the parent that a copy of the policy has been received. Providing a copy of the written policy to a parent of a minor by certified mail, return receipt requested, shall satisfy the requirements of this subparagraph.

An adequate policy, and distribution of it, is a requisite to compliance with Iowa Code §730.5. *See McVey v. National Organization Service*, Inc., 719 N.W.2d 801, 803 (Iowa 2006)("requirement that the employer adopt an employee drug-testing policy and deliver it to each employee is a necessary step in invoking the statutory authorization for such testing.").

730.5(10) authorizes employment action under specified conditions:

> 10. Disciplinary procedures.
>
> a. Upon receipt of a confirmed positive test result for drugs or alcohol which indicates a violation of the employer's written policy, or **upon the refusal of an employee** or prospective employee to provide a testing sample, an employer may use that test result or test refusal as a valid basis for disciplinary or rehabilitative actions **pursuant to the requirements of the employer's written policy** and the requirements of this section, which may include, among other actions, the following:
> …
> (3) Termination of employment.

So putting this together, the conditions governing when may an employee be fired pursuant to Iowa Code §730.5(10) are: (1) confirmed test result or refusal to take, and (2) result indicating a violating of written policy or a refusal to take (here alleged adulteration), (3) provision of a written drug testing policy to every employee subject to testing, and (4) termination is pursuant to the requirements of the written policy.

This Employer's practices run afoul of the requirement that the drug testing policy be provided to the every employee subject to testing. In this way the case at bar is almost identical to the Iowa Supreme Court case of *McVey v. National Organization Service*, Inc., 719 N.W.2d 801, 803 (Iowa 2006). In *McVey* the plaintiff alleged that she had not received a copy of "the written drug-testing policy that NOS adopted pursuant to section 730.5(9)." *McVey* at 802. The plaintiff argued "that the requirement that the employer adopt an employee drug-testing policy and deliver it to each employee is a necessary step in invoking the statutory authorization for such testing" to which the Court stated "We agree." *Id.* The Court then found that the allegation of not getting a copy of the policy was itself sufficient to bring the case to trial on whether the plaintiff had been fired in violation of Iowa Code §730.5.

The literal text of the statute, and *McVey*, make crystal clear that a drug testing policy must be "provided" to every employee to be tested, and that the policy must remain "available for review by employees." Here the Employer did neither. We are thus compelled to find that this Employer was not authorized to administer a drug test to the Claimant. The Claimant therefore could not have been legally required to have undergone the test. His alleged tampering therefore was a refusal to undergo an illegal test and cannot be misconduct under Iowa's law. The same holds for his refusal to provide a second

sample based on his alleged tampering with the illegal first test.

DECISION:

The administrative law judge's decision dated June 1, 2011 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for no disqualifying reason. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible. Any overpayment which may have been entered against the Claimant as a result of the Administrative Law Judge's decision in this case is vacated and set aside.

_____
Monique Kuester

_____
Elizabeth L. Seiser

RRA/kk