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

DANIEL M DITMARSON

Claimant,

and

SWIFT & COMPANY

Employer.

HEARING NUMBER: 09B-UI-04205

EMPLOYMENT APPEAL BOARD
DECISION

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

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. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Daniel Ditmarson (Claimant) was employed by Swift & Co. (Employer) as a full-time production worker from December 11, 2006 until the date of his discharge on January 29, 2008. (Tran at p. 2; p. 9). He was discharged for the state reason of violating the employer's drug and alcohol policy. (Tran at p. 2).

On January 14, 2008, Mr. Ditmarson was ordered to undergo a drug screen. (Tran at p. 3). The Employer based this order on what it felt was reasonable suspicion. (Tran at p. 2). The Employer claimed that at some point in time someone had observed the Claimant with glassy eyes, with a flushed face, with speech slurred, with mood swings, with a sloppy appearance, and overreacting to criticism.

(Tran at p. 2). The Employer did not establish at hearing whether these phenomena were observed at the

same time. The Employer did not establish at hearing who made which observations or when. The Employer did not establish what training the person or persons making the observations had in detecting symptoms of drug use. The Employer did not establish on what basis these persons decided things such as what is being unusually moody or sloppy.

On January 14 the testing was to be done by the employer's EMT. (Tran at p. 3). If an employee disputes the findings made by the EMT, the specimen is sent for further testing at an independent lab. (Tran at p. 3). In the course of the testing process the Employer came to conclude that the Claimant had tampered with the sample. (Tran at p. 3-5; p. 15; p. 20-21). The Claimant was given the opportunity to provide another urine specimen but refused. (Tran at p. 4; p. 15; p. 20-21).

The Claimant was suspended on January 14 and notified of his discharge on January 29, 2008. (Tran at p. 5). The stated reasons for the discharge were the alleged adulterating of the initial test and the refusal to submit a second urine specimen. (Tran at p. 2; p. 15; p. 17; p. 20; p. 22; p. 23).

REASONING AND CONCLUSIONS OF LAW:

Misconduct Standards: Iowa Code Section 96.5(2)(a) (2009) 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). "The key question is what a reasonable person would have believed under the circumstances." *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330, 337 (Iowa 1988); *accord O'Brien v. EAB*, 494 N.W.2d 660 (Iowa 1993)(objective good faith is test in quits for good cause).

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 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. Thus an employer has no right to require an employee to take a reasonable suspicion drug test if there is no reasonable suspicion for the test.

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.

Reasonable Suspicion 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)

An employee in Iowa may be subjected to a mandatory drug test only upon certain specified conditions:

> 8. Drug or alcohol testing. Employers may conduct drug or alcohol testing as provided in this subsection:
> …
> c. Employers may conduct reasonable suspicion drug or alcohol testing.

Iowa Code §730.5(8). Here the Employer relies on the provision allowing reasonable suspicion tests. Iowa Code §730.5(1)"i" defines "reasonable suspicion":

> i. "Reasonable suspicion drug or alcohol testing" means drug or alcohol testing based upon evidence that an employee is using or has used alcohol or other drugs in violation of the employer's written policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. For purposes of this paragraph, facts and inferences may be based upon, but not limited to, any of the following:
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> (1) Observable phenomena while at work such as direct observation of alcohol or drug use or abuse or of the physical symptoms or manifestations of being impaired due to alcohol or other drug use.
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> (2) Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance.
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> (3) A report of alcohol or other drug use provided by a reliable and credible source.
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> (4) Evidence that an individual has tampered with any drug or alcohol test during the individual's employment with the current employer.
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> (5) Evidence that an employee has caused an accident while at work which resulted in an injury to a person for which injury, if suffered by an employee, a record or report could be required under chapter 88, or resulted in damage to property, including to equipment, in an amount reasonably estimated at the time of the accident to exceed one thousand dollars.
>
> (6) Evidence that an employee has manufactured, sold, distributed, solicited, possessed, used, or transferred drugs while working or while on the employer's premises or while operating the employer's vehicle, machinery, or equipment.

Looking over this list we cannot find reasonable suspicion in this case. Starting with the easy cases we of course have no evidence (other than what might fall under the first two paragraphs) that the Claimant is guilty of any of the infractions listed in division 6. Also while we have testimony about generic accidents we have no idea the amount of estimated damage and so division 5 does nothing for the Employer. (Tran at p. 2). The Employer further does not claim a report of alcohol or drug use from a reliable and credible source as required by division 3. This leaves divisions 1, 2 and 4.

Division 1 refers to "physical symptoms or manifestations of being impaired due to alcohol or other drug use." The subparagraph as a whole refers to "objective and articulable facts and reasonable inferences." Thus the symptoms and manifestations must be based on some sort of specific evidence leading to a reasonable inference of being impaired. We just can't get there on the evidence presented. The facts are general, not specific. The reliability of the source does not appear in the record. We know who reported something but not who reported what, when, and under what condition the observations were made. If we at least knew that the Claimant was flushed, glassy eyed, and slurred in speech all at the same time then we might have something. But we don't know this. Further we do not have any idea what expertise the person observing these conditions had. In short, the Employer has not proved "physical symptoms or manifestations of being impaired due to alcohol or other drug use" through credible and reliable evidence.

Division 2 refers to "abnormal conduct or erratic behavior while at work." Again the subparagraph requires specific and reliable evidence. We have no way of assessing how it was decided the Claimant deserved such subjective descriptions as "overreacting", "moody" or "sloppy." No examples are given. The expertise of the observer is not explained. The opportunity to observe the Claimant is not explained. Indeed in reality we have no description of "conduct" or "behavior" but only conclusions. The Employer did not present division 2 evidence that was credible and reliable.

Finally, division 4 allows testing if there is evidence of tampering in a previous test. Obviously this provision does not authorize a test based on possible tampering with that same test. The test must be authorized before it can be administered, and it must be administered before it can be tampered with. Tampering is logically subsequent to administration and therefore cannot be used as the necessary prior justification of the administration. In short, even tampering with an illegal test does not make that test legal. And it cannot be the basis for requiring another test. Yet even if we were to conclude otherwise we just cannot find that the Employer proved tampering in this case. All that was supplied was hearsay testimony and guesswork based on that testimony. The Claimant vehemently denied tampering. We do not find the Employer's evidence to be more credible. Without more we do not find that the Employer proved by a preponderance of the evidence that the Claimant tampered with the testing sample.

Looking beyond the specific paragraphs we consider whether there are "specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience" supporting reasonable suspicion. For the reasons we explained in connections with divisions 1 and 2 we have no such evidence in this case. Under our analysis the Employer did not have reasonable suspicion for its drug test. 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 or provide a second sample based on his alleged tampering with the illegal preliminary test.

DECISION:

The administrative law judge's decision dated April 27, 2009 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.

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John A. Peno

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Elizabeth L. Seiser

RRA/fnv

DISSENTING OPINION OF MONIQUE KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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Monique F. Kuester

RRA/fnv