

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

RUSH E DAVIDSON
Claimant

GLOBALSOURCE INC
SKILLED TRADES SERVICES
Employer

APPEAL 15A-UI-11472-JP-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 04/12/15
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed an appeal from the October 6, 2015, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 28, 2015. Claimant participated. Employer participated through Candy Parkhurst-Cribb and Kathy Lewison. Claimant Exhibit A was admitted into evidence with no objection. Employer Exhibit One was admitted into evidence with no objection.

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: Claimant was employed full-time as a laborer last assigned at Hometown Heating and Plumbing from June 18, 2015, and was separated from the assignment, and the employer, on August 14, 2015 when he was discharged.

Claimant was hired by Skilled Trades Services on June 18, 2015. Claimant was then placed on assignment at Hometown Heating and Plumbing on June 18, 2015. Claimant worked for Hometown Heating and Plumbing until August 14, 2015. On August 14, 2015, claimant was removed from the assignment for smelling of alcohol and acting funny on the job site. Ms. Parkhurst-Cribb was contacted by the assignment to come pick claimant up at the job site. Ms. Parkhurst-Cribb picked up claimant and took him to a clinic to be tested for alcohol. Ms. Parkhurst-Cribb observed that claimant was acting loud and smelled of alcohol. At the clinic, claimant was given two separate breath tests, both tested positive for alcohol. Employer Exhibit One. The employer discharged claimant because of the positive alcohol test.

The employer has a substance abuse policy. Employer Exhibit One. The policy states that if the employee has “a positive result, Skilled Trades Services reserves the right to discharge you from your employment.” Employer Exhibit One. The policy does not state an alcohol concentration limit. Employer Exhibit One.

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. Benefits are allowed.

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 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. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. The employer has the burden of proving disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982).

Iowa Code § 730.5 allows drug testing of an employee upon "reasonable suspicion" that an employee's faculties are impaired on the job or on an unannounced random basis. The testimony presented by Ms. Parkhurst-Cribb about claimant smelling of alcohol on August 14,

2015, established that the employer had reasonable suspicion to have claimant tested for alcohol. Iowa Code § 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing. Claimant did receive a copy of the employer's substance abuse policy allowing for alcohol testing. Employer Exhibit One. Iowa Code § 730.5(9)(e) mandates that "[i]f the written policy provides for alcohol testing, the employer shall establish in the written policy a standard for alcohol concentration which shall be deemed to violate the policy." The statute further provides "[t]he standard for alcohol concentration shall not be less than .04, expressed in terms of grams of alcohol per two hundred ten liters of breath, or its equivalent." Iowa Code § 730.5(9)(e). The employer's substance abuse policy allowed for alcohol testing. Employer Exhibit One. The employer's substance abuse policy clearly did not define at what level the alcohol concentration of an employee would violate its policy. Employer Exhibit One. The statute clearly states that in order to violate an employer's written policy for alcohol testing, the written policy must state at what level the alcohol concentration will be deemed to have violated said policy. Iowa Code § 730.5(9)(e). Clearly, the employer's policy did not comply with Iowa Code § 730.5(9)(e). 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). While the employer certainly may have been within its rights to test and fire claimant, it failed to comply with the strict requirements of Iowa Code § 730.5(9)(e) by establishing a minimum alcohol concentration that will violate its policy. Thus, the employer cannot rely on the results of claimant's breath tests as a basis for disqualification of benefits. Because the employer cannot rely on the results of claimant's breath tests and the test results were the sole reason for discharge, the employer did not meet its burden of establishing disqualifying misconduct. Benefits are allowed.

DECISION:

The October 6, 2015, (reference 02) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/pjs