IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JEFFREY L OLSON
Claimant

METZ BAKING CO
Employer

APPEAL NO. 07A-UI-03257-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/04/07 R: 01
Claimant: Appellant (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Jeffrey L. Olson (claimant) appealed a representative's March 26, 2007 decision (reference 02) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Metz Baking Company (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 16, 2007. The claimant participated in the hearing and presented testimony from one other witness, Pat Enright. Jill Gill appeared on the employer's behalf and presented testimony from three other witnesses, Bill Bell, Kelly Clausen, and Dr. Phillip Lopez. During the hearing, Employer's Exhibits One through Three were entered into evidence. 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 August 9, 1991. He worked full time as a hand wrapper at the employer's Sioux City, Iowa bakery. His last day of work was January 19, 2007. The employer discharged him on January 22, 2007. The stated reason for the discharge was having a positive drug test in violation of the employer's drug and alcohol policy.

On January 17, 2007, the claimant was injured at work in an OSHA reportable accident that necessitated that he be taken to the hospital, where he had inpatient surgery for lacerations and a compound fracture to his left thumb. While he was at the hospital, he was informed that under the employer's written drug and alcohol policy, of which he was otherwise also on notice, that he was required to submit to a post-accident drug and alcohol test. He was shown to the restroom by the hospital's laboratory technician and provided a urine sample.

A split portion of the sample was maintained and the primary sample was subjected to testing at a certified laboratory. The initial test indicated a positive result, so a second confirmatory test (gas chromatography/mass spectrometry) was utilized on the primary portion of the sample.

This also yielded a positive result for marijuana. Dr. Lopez, the medical review officer for the testing laboratory, then contacted the claimant on January 22 to inquire as to whether the claimant had any medical condition or legitimate medications which could have caused a false positive. The claimant acknowledged he did not take any legitimate medications such as could cause a false positive, and admitted that he had used marijuana about two months prior. While the claimant would not have still been intoxicated by use of the marijuana two months after consumption, Dr. Lopez confirmed that metabolites from the consumption could remain in the claimant's system for that long after consumption.

The drug test results were then communicated to the employer on January 22. The employer hand-delivered to the claimant a letter informing him of his termination for failing the drug test, which also advised him of his right to have a retest of the split portion of the sample. The claimant initially pursued having the split sample retested, but prior to the retest actually occurring, on January 30 he advised his union representative, Mr. Enright, that it would be a waste of time and money to proceed with the retest of the split portion of the sample, as the result would probably be the same as for the primary sample.

The claimant asserted that the reason he determined not to proceed with the testing of the split portion of the sample was because the sample had been contaminated by being dropped onto the floor when he gave it to the laboratory technician. The administrative law judge does not find this contention to be credible, given that the claimant did not immediately tell his union representative of that contention, did not immediately tell the employer of that contention when he was being discharged, and did not tell Dr. Lopez when Dr. Lopez was questioning him on issues relating to the validity of the test; rather, he acknowledged prior drug ingestion to Dr. Lopez, the more reasonable explanation as to why the claimant would state that the result of testing the split portion of the sample would be the same as for the primary portion of the sample. The claimant's credibility is further called into question by the fact that he now denies he ever sought to cancel the testing of the split portion of the sample even though his own union representative convincingly testified that, in fact, the claimant did cancel the testing.

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 § 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.
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> 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 laws. Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553, 558 (Iowa 1999). The Eaton court said, "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. The employer also needs to be in conformance with its own policies. The employer substantially complied with the drug testing law and its own policies. A preponderance of the evidence establishes the claimant violated the employer's drug policy. It is not necessary to establish a violation that the claimant be still "under the influence" of the drug; it is sufficient that there were ample metabolites in his system to trigger a positive result on the drug test. The claimant's failing of the drug test 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 March 26, 2007 decision (reference 02) is affirmed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of February 22, 2007. 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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