

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KARLA L HOFFERT
Claimant

APPEAL NO. 13A-UI-13134-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TRINITY STRUCTURAL TOWERS INC
Employer

OC: 10/27/13
Claimant: Appellant (2)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated November 19, 2013, reference 01, that concluded she was discharged for work-connected misconduct. A telephone hearing was held on December 19, 2013. The parties were properly notified about the hearing. The claimant participated in the hearing. Chris Hopwood participated in the hearing on behalf of the employer. Exhibits One through Three were admitted into evidence at the hearing.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked for the employer from March 2012, to October 29, 2013. At the time of hire, she was given and signed for a one-page summary of the employer's alcohol, drug, and unauthorized substances policy. The summary page stated the entire policy would be applied as if it was set forth in full in the summary. The claimant was never provided a copy of the full policy. The summary page stated that employees were prohibited from possessing, using, or being under the influence of alcohol or illegal drugs on company property or during working hours. The summary page stated the employer had the right to drug test an employee who the employer had reason to believe was under the influence of illegal drugs or to perform other testing consistent with corporate policies. The summary page does not state random drug testing is permitted. The summary page provides that an employee is subject to discharge if: (1) after testing an employee is found to be under the influence of alcohol or illegal drugs, or (2) an employee refuses to submit to a required drug or alcohol test.

The claimant was required to submit to a random drug test on October 29, 2013. She was accompanied into a bathroom by a urine collector and went into a bathroom stall and provided urine in a cup that was immediately given to the urine collector. The urine collector recorded that the sample was "out of temperature range," but she did not fill in the required blank on the chain of custody form where she is to record the temperature of the specimen. The claimant was given water to drink and waited an hour and a half. She tried to urinate again, but she could not produce any urine. The collector told her she had a little bit of time left but did not

state what amount of time she had to produce a sample. The claimant did not think she would be able to provide another sample anytime soon, so she told the collector and human resources director that it was stupid and she needed to go back to work. The human resources manager told her that she would be terminated if she left without providing another sample.

When the claimant left, the employer deemed her to have refused to submit to testing and discharged her.

REASONING AND CONCLUSIONS OF LAW:

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

The Iowa Supreme Court has ruled that an employer cannot establish disqualifying misconduct based 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). As 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.

Under Iowa Code § 730.5-9-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."

Under Iowa Code § 730.5-9-b, the employer's written policy must provide uniform requirements for what disciplinary action can be taken upon receipt of "a confirmed positive test result for drugs or alcohol or upon the refusal of the employee or prospective employee to provide a testing sample." Iowa law specifies that an employer may impose disciplinary action, including discharge, for a refusal of an employee to provide a testing sample. Iowa Code § 730.5-10-a.

I conclude that the employer's failure to provide the full drug and alcohol testing policy to the claimant violated Iowa Code § 730.5-9-a(1). This provision is particularly important in this case because the one-page summary does not even authorize the type of testing performed in this case, random drug testing or set forth the circumstances under which an employee can be considered to have refused to submit to a test. In this case, the claimant submitted to a test and provided a testing sample, but it was rejected by the collector. The collector stated it was out of temperature range but did not record the temperature. The claimant tried to provide a second sample but was not able to urinate again.

Under the facts of this case, the claimant is not subject to disqualification because the employer's testing was not in compliance with the chapter 730.

DECISION:

The unemployment insurance decision dated November 19, 2013, reference 01, is reversed. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/pjs