IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

WESLEY DANIEL
Claimant

CYPRESS TRUCK LINES
Employer

APPEAL NO. 14A-UI-01085-SWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/08/13
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated January 22, 2014, reference 03, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on February 19, 2014. The parties were properly notified about the hearing. The claimant participated in the hearing. Toni McColl participated in the hearing on behalf of the employer with a witness, George Cornelius. Exhibits One through Five were admitted into evidence at the hearing.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant filed a new claim for unemployment insurance benefits effective September 8, 2013, when his employment with Heartland Express ended.

The claimant worked full time for the employer as a truck driver from November 11, 2013, to December 26, 2013. He resides in Georgia, and the employer reported his wages to the state of Georgia for unemployment insurance purposes. His new employee orientation, however, took place at the employer's terminal in Jacksonville, Florida.

The claimant was informed and understood that the employer's drug and alcohol policy, the employer would not employ a person using illegal drugs and a negative drug test was required as a condition of employment. The policy stated the employer could—based on either the Department of Transportation regulations or its own policy—require a driver to submit to a urine or hair-follicle drug screen at any time. Under the policy, employees who tested positive on a DOT-mandated or employer-policy drug screen were subject to termination.

The claimant passed his pre-employment drug test of his urine as required by the DOT regulations and was qualified to drive under federal law.

During his orientation, the claimant was also required to submit to a non-DOT hair follicle drug test under the employer's drug testing policy. He went to a health care facility in Jacksonville, Florida, on November 14, 2013, where a sample of hair was cut from his head. The sample was sent to Quest Diagnostics in Lenexa, Kansas, a laboratory certified by the United States Department of Human Services.

The sample was subjected to an initial drug screen and a confirmatory test. The laboratory reported that the claimant tested positive for cocaine to the employer's drug-test administrator, National Medtest Inc. on November 19. For some reason, the test results were not initially reported to employer by National Medtest Inc.

After completing his orientation, the employer allowed the claimant to drive for the employer starting December 2, 2013. He continued to drive for the employer without incident until December 26, 2013. At that point, George Cornelius, the employer's safety director found out about the pre-employment hair test that was reported positive for cocaine.

On December 26, Cornelius contacted the claimant, told him about the positive test result for cocaine, and informed him that he was discharged.

Cornelius did not inform the claimant in writing of the positive test result, the consequences of such results, and the options available to the employee or job applicant, including the right to submit information to the employer explaining or contesting the test result or obtain a retest of the hair sample. There is no evidence that before the test the claimant was provided a form to provide information he considered relevant to the test, including identification of currently or recently used prescription or nonprescription medication or other relevant medical information.

The claimant had voluntarily sought and completed drug abuse treatment in July 2013. He had not used illegal drugs after completing his drug abuse treatment.

The claimant reopened his Iowa claim effective December 29, 2013. The employer's account is not presently chargeable for benefits paid to the claimant since it is not a base period employer on the claim.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance 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 employer has the burden to prove a 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 N.W.2d 661, 665 (Iowa 2000).

In addition, the unemployment insurance rules provide: "While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act." 871 IAC 24.32(8). So the first question is whether the claimant's drug test administered about a month and a half before his discharge was a current act of misconduct.

In *Greene v. Employment Appeal Board*, 426 N.W.2d 659 (Iowa App. 1988) the court ruled that to determine whether conduct prompting the discharge constitutes a disqualifying current act, the decision maker must consider the date on which the conduct came to the employer's attention and the date on which the employer notified the employee that the conduct provided grounds for dismissal. Any delay in taking action must have a reasonable basis. The court decided that the three-day delay between final act and notice of possible dismissal was not unreasonable. *Id*. at 662. An argument can be made that that drug-testing administrator's delay in notifying the employer should be attributable to the employer. However, I believe the safety director's testimony that the employer did not learn about the failed drug test until December 26, 2013, and took immediate action. This satisfies the current act requirement.

The next question is whether the drug testing in this case must comply with Iowa law before the claimant can be disqualified from receiving benefits. 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.

Iowa's drug testing laws do not apply to testing required under federal law and regulations. Iowa Code § 730.5-2. If federal law applied to the testing in this case, I believe the reasoning of *Eaton* and *Harrison* would require compliance with federal law before disqualifying a claimant discharged for failing a drug test. As a preliminary matter then, I must decide if the drug test given to the claimant on November 14 was required by federal law. DOT regulations found at 49 C.F.R. Part 382 and Part 40 describe the circumstances and procedures for conducting workplace drug and alcohol testing for the federally-regulated transportation industry. DOT rules require pre-employment testing "prior to the first time a driver performs safety-sensitive functions for an employer." 49 C.F.R. §§ 382.301. The claimant actually satisfied this requirement because he passed the DOT-required urine test. But, the rules make it clear that transportation employers can require employees to undergo drug testing beyond that required by federal law. 49 C.F.R. §§ 382.111. This is important because the hair test given to the claimant on November 14 does not satisfy DOT requirements since only urinalysis is allowed for drug testing and confirmatory drug tests. 49 C.F.R. § 40.3. The testing that caused the claimant's discharge in this case was not DOT testing.

Furthermore, if complying with Iowa drug testing law is required to disqualify a claimant under the rulings in *Eaton* and *Harrison*, the claimant would not be disqualified because the testing violates Iowa law in several important respects. First, only blood, urine, or oral fluid testing is allowed in Iowa. Iowa Code § 730.5-1-b. Second, Iowa law requires an employer to notify an employee by certified mail of the drug test results and the right to have an independent test

performed on the split sample. Iowa Code § 730.5-7-i(1). None of these Iowa requirements have been met. The question then is whether Iowa's drug testing law applies here.

The claimant filed his claim for benefits in Iowa because he had base period wages from an Iowa employer. But his employment with the employer was not in Iowa. The employer reported his wages for unemployment purposes to Georgia based on his residence. Federal and state rules state that all provisions of the unemployment compensation laws of the paying state (Iowa in the case) shall be applied in determining a claimant's eligibility for benefits. 20 CFR 616.8; 871 IAC 24.38(1)d. On the other hand, the state that transfers wages to the paying state decides whether the employer's account should be charged for benefits paid based the transferred wages. These same principles apply here even though no transfer of wages from Georgia has occurred yet. Iowa's authority is limited to deciding the claimant's qualification for benefits using Iowa law.

The fact that Iowa's unemployment laws apply, however, does not mean the requirements of Iowa's drug testing laws apply to this case. First, Iowa Code § 730.5-1-d defines "employee" for the purpose of drug testing as "a person in the service of an employer in this state." Second, since the testing was done at his orientation site in Florida, the employer could not be expected to follow Iowa law in testing. In my judgment, however, the reasoning of *Eaton* and *Harrison* should still apply, which means the claimant would only be disqualified if the applicable drug testing laws have been complied with in this case. I conclude that the law of the state where the testing occurred should apply. This is because the employer could not be expected to conduct different types of testing of drivers during their orientation in Florida depending on the state of residence of the driver.

In *Dann Ocean Towing, Inc. v. Fla. Unemployment Appeals Comm'n*, 37 So. 3d 968, 968 (Fla. 1st District Court of Appeals 2010), the court ruled that an employer failed to prove that its employee was discharged for misconduct connected with his work because it failed to demonstrate that the drug test the employee allegedly failed was conducted in compliance with the requirements of Florida Statutes § 443.101(11).

Florida Statutes § 443.101(11) provides that positive drug test results and chain of custody documents are self-authenticating and result in a presumption that the individual used controlled substances in violation of an employer's policy if: (1) an employer has implemented a drug-free workplace program under Florida Statutes §§ 440.101 and 440.102, and (2) submits proof that it the employer has qualified for the insurance discounts provided under Florida Statutes § 627.0915 as certified by the insurance carrier or self-insurance unit.

The employer has not presented proof that its drug testing policy complies with Florida Statutes § 440.102 or it has qualified for insurance discounts under Florida Statutes § 627.0915. While hair testing appears to be authorized under § 440.102(1)(q) (the definition of specimen includes "tissue, hair, or a product of the human body capable of revealing the presence of drugs"), the testing in this case did not comply several requirements of § 440.102 as set forth below.

First, Florida Statutes § 440.102(3)(a) requires the employer's written policy contain:

- Procedures for employees and job applicants to confidentially report to a medical review officer the use of prescription or nonprescription medications to a medical review officer both before and after being tested. Florida Statutes § 440.102(3)(a)4.
- A list of the most common medications, by brand name or common name, as applicable, as well as by chemical name, which may alter or affect a drug test. Florida Statutes § 440.102(3)(a)5.

- A representative sampling of names, addresses, and telephone numbers of employee assistance programs and local drug rehabilitation programs. Florida Statutes § 440.102(3)(a)7.
- A statement that an employee or job applicant who receives a positive confirmed test result may contest or explain the result to the medical review officer within 5 working days after receiving written notification of the test result; that if an employee's or job applicant's explanation or challenge is unsatisfactory to the medical review officer, the medical review officer shall report a positive test result back to the employer; and that a person may contest the drug test result pursuant to law or to rules adopted by the Agency for Health Care Administration. Florida Statutes § 440.102(3)(a)8.
- A list of all drugs for which the employer will test, described by brand name or common name, as applicable, as well as by chemical name. Florida Statutes § 440.102(3)(a)10.
- A statement notifying employees and job applicants of their right to consult with a medical review officer for technical information regarding prescription or nonprescription medication. Florida Statutes § 440.102(3)(a)12.

Second, Florida Statutes § 440.102(5)(b) requires the employer during the testing process to:

- Provide a form for the employee or job applicant to provide any information he or she considers relevant to the test, including identification of currently or recently used prescription or nonprescription medication or other relevant medical information. Florida Statutes § 440.102(5)(b)2.
- Within 5 working days after receipt of a positive confirmed test result from the medical review officer, an employer shall inform an employee or job applicant in writing of such positive test result, the consequences of such results, and the options available to the employee or job applicant. Florida Statutes § 440.102(5)(h).

None of the eight requirements listed above were complied with in this case. Applying the principles of *Eaton* and *Harrison,* the claimant should not be subject to disqualification based on testing that was in violation of the applicable law. Like in *Harrison*, 659 N.W.2d at 584 ,the claimant did not get the written notice of the drug test result and information about his options for contesting the test results, which is an important protection given to employees to assure he accuracy of the test result. *See Harrison*, 659 N.W.2d at 587.

The employer's account is not presently chargeable for benefits paid to the claimant since it is not a base period employer on the claim. If the employer becomes a base period employer in a future benefit year, charges to its account would be determined by the state in which the claimant's wages were reported.

DECISION:

The unemployment insurance decision dated January 22, 2014, reference 03, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible. The employer's account is not presently chargeable for benefits paid to the claimant. If the employer becomes a base period employer in a future benefit year, charges to its account would be determined by the state in which the claimant's wages were reported.

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Steven A. Wise
Administrative Law Judge

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Decision Dated and Mailed

saw/pjs