

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

GARRY DAVENPORT
Claimant

SAC & FOX TRIBE
Employer

APPEAL 17A-UI-10187-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 09/17/17
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the October 2, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 20, 2017. Claimant did not register for the hearing and did not participate. Employer participated through facility director Jess Kajer, human resources director Lucie Roberts, and assistant facilities director Ty Davenport. Employer Exhibit 1 was admitted into evidence with no objection. Official notice was taken of the administrative record, including claimant's benefit payment history, with no objection.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a groundskeeper from April 6, 2004, and was separated from employment on September 11, 2017, when he was discharged.

The employer has a drug and alcohol free workplace policy in its employee handbook. Employer Exhibit 1. Claimant received a copy of employer's drug and alcohol free workplace policy. Employer Exhibit 1. Ty Davenport testified that the policy provides uniform standards for actions that are taken in case of a confirmed positive test/or refusal to submit to testing. Ty Davenport testified the employer has an awareness program to inform employees of the dangers of drug and alcohol use in the workplace. Ty Davenport testified the employer provides training to supervisory personnel regarding drug and alcohol abuse. The employer's policy

allows for drug and alcohol testing based on reasonable suspicion. Employer Exhibit 1. The employer requires two employees make the observation in order to request a reasonable suspicion test of an employee. Ty Davenport testified the employer's drug and alcohol free workplace policy does not have written standard for alcohol concentration which shall be deemed to violate its policy. The employer does have at least fifty employees. Ty Davenport testified the employer's policy does not provide for rehabilitation of the employee.

Claimant has been employed by the employer for at least twelve of the preceding eighteen months. Claimant has not previously violated the employer's substance abuse prevention policy.

On September 11, 2017, the employer's safety coordinator Tony Westendorf was speaking to claimant during claimant's scheduled shift and smelled an odor of alcohol on claimant's breath at approximately 7:45 a.m. Mr. Westendorf reported his observation to security. Security then contacted Mr. Kajer. Mr. Kajer and Ty Davenport then approached claimant. Mr. Kajer and Ty Davenport observed claimant appeared abnormally fatigued and may be under the influence of something. Mr. Kajer and Ty Davenport did not observe an odor of alcohol on claimant's breath at this time. Mr. Kajer and Ty Davenport felt there was enough reasonable suspicion to request claimant submit to an alcohol test. Employer Exhibit 1. After the employer completed the form "Observed Behavior for Reasonable Suspicion Screening", the employer contacted Security Officer Mike Gillespie. Employer Exhibit 1. Security then brought claimant to the security building to perform an alcohol breath test. Security Officer Gillespie explained to claimant what was going on. Once at the security building, the employer had Meskwaki Police Officer Blackburn to perform the breath test. Employer Exhibit 1. Claimant submitted to two breath tests for alcohol. Claimant's first test resulted in a result of .157 at 9:46 a.m. on September 11, 2017. Employer Exhibit 1. Claimant's second breath test resulted in a result of .147 at 10:07 a.m. on September 11, 2017. Employer Exhibit 1. Claimant signed an Intoxilyzer Check List for both tests. Employer Exhibit 1. After the second test, the employer placed claimant on an unpaid Investigative Leave. Employer Exhibit 1. The employer sent claimant's positive test results to the Gaming Commission. Because the employer is a casino, every employee must be licensed by the Gaming Commission to be eligible to work for the employer. Claimant was aware of this requirement when he was hired. The employer then waited for the Gaming Commissions ruling.

On September 13, 2017, the Gaming Commission notified the employer that claimant's license was suspended. Employer Exhibit 1. The employer kept claimant on Investigative Leave and waited for the Gaming Commission to complete its process.

On October 4, 2017, claimant met with the Gaming Commission. On October 11, 2017, the Gaming Commission sent another memo to the employer that claimant's license was reinstated, but with restrictions. Claimant's restrictions included that he was unable to operate vehicles or power tools as an employee for the employer. On October 12, 2017, Mr. Kajer and Mr. Davenport met with Ms. Roberts regarding the memo from the Gaming Commission. The employer decided to discharge claimant for violating its drug and alcohol free workplace policy. On October 16, 2017, the employer notified claimant he was discharged for violating the employer's Drug and Alcohol free workplace policy.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

The employer has the burden of proving disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Whether an employee violated an employer's policies is a different issue from whether the employee is disqualified for misconduct for purposes of unemployment insurance benefits. See *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000) ("Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." (Quoting *Reigelsberger*, 500 N.W.2d at 66.)).

Iowa Code section 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing. Testing under Iowa Code section 730.5(4) allows employers to test employees for drugs and/or alcohol but requires the employer "adhere to the requirements . . . concerning the conduct of such testing and the use and disposition of the results." Iowa Code section 730.5(1)(i) 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. For breathalyzer testing, initial and confirmatory testing may be conducted pursuant to the employer's written policy. Iowa Code § 730.5(7)(f)(2). "The written policy shall include requirements governing evidential breath testing devices, alcohol screening devices, and the

qualifications for personnel initial and confirmatory testing[.]”. Iowa Code § 730.5(7)(f)(2). Iowa Code section 730.5(9)(e) specifically provides:

If 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 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. (emphasis added).

Upon a positive drug screen, Iowa Code section 730.5(9)(g) requires, under certain circumstances, that an employer offer substance abuse evaluation and treatment to an employee the first time the employee has a positive alcohol test. The statute provides that “if the employer has at least fifty employees, and if the employee has been employed by the employer for at least twelve of the preceding eighteen months, and if rehabilitation is agreed upon by the employee, and if the employee has not previously violated the employer’s substance abuse prevention policy pursuant to this section, the written policy *shall provide for the rehabilitation* of the employee pursuant to subsection 10, paragraph “a”, subparagraph (1), and the apportionment of the costs of rehabilitation as provided by this paragraph “g”.” Iowa Code § 730.5(9)(g)(1) (emphasis added).

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. Although claimant provided two separate breath tests for alcohol on September 11, 2017, the employer’s drug and alcohol free workplace policy does not comply with Iowa Code section 730.5. The employer’s drug and alcohol free workplace policy does not specify “a standard for alcohol concentration which shall be deemed to violate the policy” that is .04 or greater, as required by Iowa Code section 730.5(9)(e). Ty Davenport testified that any amount will violate the employer’s policy. Furthermore, the employer has over fifty employees, claimant had no prior violation of the employer’s drug and alcohol free workplace policy, and claimant had worked at least twelve of the previous eighteen months, but the employer did not offer claimant the opportunity for rehabilitation. While the employer certainly may have been within its rights to test and fire claimant, it failed to comply with the strict and explicit statutory requirements provided under Iowa Code section 730.5. 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). Thus, the employer cannot use the results of the drug screen as a basis for disqualification from benefits. Benefits are allowed.

Although there was testimony that claimant’s license was restricted to the extent that he may not have been able to perform his normal job duties, claimant’s restrictions were put in place based off the test results the employer obtained on September 11, 2017. The employer’s drug and alcohol free workplace policy does not comply with the strict and explicit statutory requirements provided under Iowa Code section 730.5. 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). Benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The October 2, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs