

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHARLES E MATTHEWS
Claimant

APPEAL NO. 15A-UI-03034-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAGEN INC
Employer

OC: 02/08/15
Claimant: Respondent (1)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

Fagen, Inc. filed a timely appeal from a representative's decision dated March 5, 2015 (reference 01) which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on April 8, 2015. Although the claimant was given notice of hearing, he did not participate. The employer participated by Ms. Jessica Savoie, Human Resource Assistant. Employer's Exhibits A, B, C, D, and E were admitted into evidence.

ISSUE:

At issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Charles E. Matthews was employed by Fagen, Inc. from June 25, 2014 until February 12, 2015 when he was discharged for refusal to submit to a random drug screen. Mr. Matthews was employed as a full-time pipe fitter/helper for the company and was paid by the hour.

At the time that he was hired, Mr. Matthews was informed of the company's drug and alcohol policy and acknowledged receipt of the company's handbook and drug testing policy. The written policy does not specifically identify the drugs that an employee would be tested for but instead makes reference to any controlled or other substance you find in the Federal Comprehensive Drug Abuse, Prevention, and Control Act of 1970, and also refers to any controlled or other substance, other than alcohol, that is capable of altering the mood, pain level, judgment, or perception of the person consuming it. The policy defines the basis for reasonable suspicion testing; job applicant testing and routine physical examination, drug, and alcohol testing. Under the company's policy, random drug and alcohol testing may be requested for employees assigned to "safety sensitive" positions. The policy also references reasonable suspicion testing. Under the terms of the policy, violation is considered to be a violation of a company work rule and subjects employees to disciplinary actions that might include termination, suspension, transfer, or reassignment to other work duties; at the sole discretion of company management (see Employer's Exhibit E).

On February 13, 2015, Mr. Matthews and some other company employees assigned to the work site were selected by Fagan, Inc.'s safety director for random testing that day. The safety director, who was present at the work site that day, selected the employees to be tested by employee identification number and informed each employee that they had been "randomly selected" for drug testing that day. After being informed that he had been selected for drug testing that day, Mr. Matthews declined to be tested. Under the company's policy, the employer considered the refusal to be tantamount to a positive drug screen and discharged Mr. Matthews from employment.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes that the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits. It does not.

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).

The employer has the burden of proof in this matter. See Iowa Code Section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee, may not necessarily be serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

Iowa Code Section 730.5 provides the authority under which a private sector employer doing business in Iowa may conduct drug or alcohol testing of employees. In Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553 (Iowa 1999) the Supreme Court of Iowa considered the statute and held that “an illegal drug test cannot provide a basis to render an employee ineligible for unemployment compensation benefits.” Thereafter, in Harrison v. Employment Appeal Board, 659 NW 2d 581 (Iowa 2003) that Iowa Supreme Court held that where an employer had not complied with the statutory requirements for the drug test, the test could not serve as the basis for disqualifying the claimant from benefits. In the present case, the employer chose to require a “random drug test” on Mr. Matthews but the employer’s policy and manner in which employees were selected for random testing failed to comply with Iowa Code Section 730.5. Accordingly, the random test was not authorized by law and cannot serve as a basis for disqualifying Mr. Matthews from unemployment insurance benefits. The company’s drug testing policy also would not clearly identify the substances that an employee might be tested for under the company’s drug testing policy, and provides that discipline for violation of the policy can vary at the employer’s discretion. Iowa Code Section 730.5 requires that the company’s policy have uniform standards for actions that will be taken in case of confirmed, positive tests or refusal to submit to testing. Company policy must inform employees of the drugs that they may be tested for.

Iowa Code Section 730.5(1)j of the Iowa Drug Testing Statute provides for unannounced drug or alcohol testing (random), provides for testing for the purposes of detecting drugs or alcohol without advance notice of the test to employees, and subjects employees to testing without individualized suspicion. The statute requires selection of employees to be tested from the pool of the employees subject to testing, it shall be done based a neutral and objective selection process by an entity independent from the employer, and shall be made by a computer based random number generator that is match with employees social security numbers, payroll identification numbers, or other comparable and identifiable numbers; in which each member of the employee population subject to testing has an equal chance of selection for initial testing and shall only be done through a computer program that records each selection attempt by date, time, and the employee number, by a third party entity independent from the employer.

Because the employer’s drug and alcohol testing policy did not comply with Iowa Code Section 730.5, the random drug test that the claimant refused on February 13, 2015 was not authorized by law and cannot serve as a basis for disqualifying Mr. Matthews from unemployment insurance benefits. Based upon the evidence in the record and the application of the appropriate law, the administrative law judge concludes that Mr. Matthews was discharged for no disqualifying reason. Accordingly, Mr. Matthews is eligible for benefits, providing that he meets all other eligibility requirements of Iowa law. The employer’s account shall be charged for benefits paid to Mr. Matthews.

DECISION:

The representative's decision dated March 5, 2015 (reference 01) is affirmed. The claimant was discharged under non-disqualifying conditions. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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