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

CHRISTINA ZINK Claimant **DES MOINES IND COMMUNITY SCH DIST** Employer	**APPEAL NO: 14O-UI-09283-ET** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/06/14** **Claimant: Respondent (1)**

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 28, 2014, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on September 30, 2014. The claimant participated in the hearing. Marci Cordero, Supervisor of Health Services; Anthony Spurgetis, Human Resources Generalist; Rhonda Wagner, Benefits Specialist; and Kathy McKay, Executive Director of Risk Management; participated in the hearing on behalf of the employer. Employer's Exhibits One through Six were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time special education associate for Des Moines Independent Community School District from September 5, 2000 to April 9, 2014. She was discharged for being under the influence of alcohol at work.

On April 8, 2014, the claimant's co-worker, Richard Craft, notified Principal Kevin Biggs he detected the odor of alcohol on her when she arrived at work that morning. Mr. Biggs called the claimant into his office and informed her there was a suspicion she might be under the influence of alcohol and asked her if she had consumed any alcohol that morning. The claimant stated she had not and Mr. Biggs asked when she last drank alcohol. The claimant told him she had two to three beers the previous evening, stopping around 11:00 p.m. She also indicated she was going through a divorce and was experiencing a great deal of stress and the alcohol helped her alleviate some of that stress.

The employer's witnesses were not aware of whether Mr. Craft had received a minimum of one hour of training in reasonable suspicion observation. The employer's witnesses believed Mr. Biggs has received the required training. Mr. Craft completed the reasonable suspicion checklist as required by the employer's policy. However, the employer's policy regarding

reasonable suspicion, requires that if more than one employee trained to determine reasonable suspicion observes the employee who is the subject of the drug test, that employee must also document his or her reasons.

The reasonable suspicion checklist contains the following categories: walking, standing, speech, demeanor, actions, eyes, face, appearance/clothing, breath, movements, eating/chewing, miscellaneous (Employer's Exhibit Six). Mr. Craft indicated under "demeanor" that the claimant was cooperative and calm, her "actions" were somber and sullen and calm the day before, her "face" was flushed, her "breath" had an alcoholic order, and she was "chewing gum" (Employer's Exhibit Six).

Mr. Biggs then called Director of High Schools Alisa Farmer and told her about the situation and asked her how he should proceed. It was determined Mr. Biggs should contact health services and ask the claimant to submit to blood alcohol testing. He returned to his office and told the claimant he had reasonable suspicion to require the claimant to submit to a test for alcohol under the employer's drug and alcohol policy. He informed her she would be transported to a district approved testing facility for an assessment as was standard procedure. The claimant indicated she understood and stated she did not mind being tested.

The claimant was escorted to Penn Avenue Medical Center by Marci Cordero, Supervisor of Health Services, where breath alcohol tests were conducted by a technician of unknown qualifications. The claimant's Breathalyzer results showed .042 at 9:37 a.m. and .035 at 9:54. The claimant and the employer were notified of the test results by the technician. The employer's threshold limit number is .02 or greater. Ms. Cordero notified Mr. Biggs and Human Resources and transported the claimant back to the school. The medical review officer's report simply states a urinalysis test was sent to a laboratory for a drug screen but there was no evidence of any drug use besides alcohol in the claimant's test.

On April 9, 2014, Anthony Spurgetis, Human Resources Generalist, met with the claimant and a union representative and presented the claimant with the test results and allowed her to provide her side of facts regarding the situation. As it was apparent the claimant's employment was going to be terminated, the claimant's union representative asked Mr. Spurgetis if the claimant could resign rather than face certain termination, and she was allowed to do so.

The employer has a written alcohol and other drug policy but it does not provide for rehabilitation for first time alcohol offenses.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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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.

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 issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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 section 96.5-2-a; 871 IAC 24.32(1)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).

The reason cited by the employer for discharging the claimant is violation of the employer's drug and alcohol policy through a positive alcohol test. In order for a violation of the employer's drug or alcohol policy by a positive drug or alcohol test to be disqualifying misconduct, it must be based on a test performed according to the school board's alcohol policy. In Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553, 558 (Iowa 1999), the 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. It is clear that as in the Eaton case, the court would require the employer to comply with its own policy.

One of the authorized circumstances in the employer's policy under which the employer may require an employee to submit to testing is where there is "reasonable suspicion" an employee has consumed alcohol in violation of the employer's policies. The employer's written policy provides a written standard for alcohol concentration which shall be deemed to violate the

policy. That limit for the Des Moines Independent School District is .02 percent (Employer's Exhibit Five). Finally, the employer's policy requires supervisory personnel of the district delegated to determine reasonable suspicion in drug or alcohol cases to receive one hour of training each in drug and alcohol misuse (Employer's Exhibit Five). "The training must address the physical, behavioral, speech, and performance indicators of probable alcohol misuse" and drug use (Employer's Exhibit Five). Furthermore, the policy states, "If more than one employee trained to determine reasonable suspicion observes the employee who is the subject of the drug test that employee must also document his or her reasons" (Employer's Exhibit Five). While Mr. Craft completed the "Reasonable Suspicion Checklist," it is not clear he was trained in reasonable suspicion observation. Mr. Biggs was apparently trained in reasonable suspicion observation but did not complete the checklist or otherwise document his reasons for requesting reasonable suspicion drug test.

In this case, the employer's instincts may have been correct in deducing that the claimant may have been under the influence of alcohol, but in making the discharge decision, the employer chose to rely on the results of the alcohol testing, rather than on making further specific observations to support a "lay" conclusion that the claimant was under the influence. Benavides v. J.C.Penney Life Ins. Co., 539 N.W.2d 352 (Iowa 1995). Since the employer chose to rely on the alcohol testing results, it is compelled to comply with the provisions of its policy in order to discharge an employee based on those results. As noted above, the employer has failed to satisfy at least one provision of its policy, if not two provisions of its policy. In order to rely on an alcohol test result to make a discharge; the employer has not substantially complied with the drug and alcohol testing provisions of its policy.

Finally, the employer's policy not only refers to its policy but also mentions the National Highway Traffic Safety Administration (NHTSA) test with regard to "ensuring that the quality assurance plan, developed by the manufacturer and approved by NHTSA for the evidentiary breath testing device used for alcohol testing of its employees describes the inspection, maintenance and calibration requirements and intervals for it" (Employer's Exhibit Five). Section L of the employer's policy refers to "Consequences of violating this policy, its supporting procedures *or the law*" (Employer's Exhibit Five) (Emphasis added). Section L. 1. states, "The superintendent may discipline employees who violate this policy, its supporting procedures *or the law* relating to alcohol and drug testing" (Employer's Exhibit Five) (Emphasis added). While Iowa Code section 730.5 does not apply to this employer as a public sector employer, its policy does refer to *the law* on more than one occasion. (Emphasis added). Although it does not refer to a specific law, given that the policy covers drug and alcohol testing, a plain reading of the policy references to *the law* would lead to the natural conclusion that the policy is referring to Iowa Code section 730.5 (Emphasis added). While this analysis did not use Iowa Code section 730.5, the employer's policy is somewhat ambiguous when it refers to "the law." It would be clearer to employees and administrators alike if the policy specified what it means when it states *the law*. (Emphasis added). The court has ruled that "substantial compliance" with Iowa Code section 730.5 is not sufficient. By the same token, it seems only logical that the court would require the employer abide by its policy and that substantial compliance does not satisfy the employer's burden of proof. Therefore, while the claimant did produce a positive alcohol test result in excess of the employer's 0.02 alcohol standard, the employer did not comply with the provisions of its policy with regard to detailing whether Mr. Craft was trained to determine whether there was a reasonable suspicion to test the claimant and Mr. Biggs, who was more likely to have received the training but the employer could not state that with certainty, failed to document his reasons for the reasonable suspicion testing under any of the observable phenomena.

Consequently, the administrative law judge concludes the employer did not comply with its reasonable suspicion alcohol testing policy. Therefore, benefits must be allowed to the claimant.

DECISION:

The April 28, 2014, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

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