

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RUSSELL J BROWN
Claimant

APPEAL NO. 08A-UI-03271-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 03/02/08 R: 01
Claimant: Appellant (2)

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Russell Brown filed an appeal from a representative's decision dated March 27, 2008, reference 01, which denied benefits based on his separation from Tyson Fresh Meats, Inc. (Tyson). After due notice was issued, a hearing was held by telephone on April 16, 2008. Mr. Brown participated personally. The employer participated by Susan Pfeifer, Human Resources Manager, and Melissa Van Syoc, Nurse. Exhibits One through Four were admitted on the employer's behalf.

ISSUE:

At issue in this matter is whether Mr. Brown was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Brown was employed by Tyson from June 5, 2006 until March 5, 2008. He was employed full time in general maintenance. He was discharged after he tested positive for alcohol on March 4, 2008. He had previously tested positive for alcohol on February 17, 2007 and opted to undergo "self-rehabilitation" pursuant to the employer's policy. He was suspended from work and required to have a negative alcohol test upon his return to work. Mr. Brown also tested negative for alcohol during the first eight weeks following his return.

Because he tested positive for alcohol in February of 2007, Mr. Brown was subject to periodic testing for the 12 months following the testing done during the initial eight weeks after his return. On March 4, 2008, he was required to undergo one of the periodic tests for the presence of alcohol. His test results exceeded the .04 level allowed by the employer and, as a result, he was discharged on March 5, 2008. The positive alcohol test result was the sole reason for the separation.

The employer's written alcohol policy does not contain requirements governing evidential breath testing devices and alcohol screening devices. Nor does it contain requirements governing qualifications for the personnel administering the testing.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Mr. Brown was discharged based on an allegation that he violated the employer's alcohol policy. It is true that the testing results obtained from March 4, 2008 exceeded the employer's standards as stated in the alcohol policy. However, that is not the end of the inquiry.

Alcohol testing in the workplace is controlled by Iowa Code section 730.5. The employer's written alcohol testing policy must include "requirements governing evidential breath testing devices, alcohol screening devices, and the qualifications for personnel administering initial and confirmatory testing." 730.5(7)f(2). Tyson's policy (Exhibit Four) does not contain these mandatory requirements. Testing that does not conform to the requirements of section 730.5 cannot form the basis of a disqualification from job insurance benefits. Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553, 557 (Iowa 1999).

Because the employer's written alcohol policy did not provide the information required by 730.5(7)f(2), testing done pursuant to the policy cannot be used to disqualify Mr. Brown from receiving job insurance benefits. For the reasons stated herein, the administrative law judge concludes that the employer has failed to satisfy its burden of proving that Mr. Brown should be disqualified from receiving benefits. While the employer may have had good cause to discharge, conduct that might warrant a discharge from employment will not necessarily support a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa 1983).

DECISION:

The representative's decision dated March 27, 2008, reference 01, is hereby reversed. Mr. Brown was discharged, but disqualifying misconduct has not been established. Benefits are allowed, provided he satisfies all other conditions of eligibility.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/kjw