

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SHANE B WHEELDON
Claimant

QWEST CORPORATION
Employer

APPEAL 15A-UI-08832-SC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/12/15
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 4, 2015, (reference 01) unemployment insurance decision that denied benefits based upon the determination he was discharged for being intoxicated at work. The parties were properly notified about the hearing. A telephone hearing was held on August 27, 2015. Claimant Shane Wheeldon participated on his own behalf. Employer Qwest Corporation was represented by Maxine Piper of Barnett Associates, Inc. and participated through Area Plant Supervisor for Des Moines Curtis Zellmer, Area Plant Supervisor for Ankeny Pete Vielhaber, and Area Plant Supervisor for Design Services Barbara Kendrick. Employer's Exhibits 1 through 8 were received.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time network technician beginning October 11, 1997, and was separated from employment on July 14, 2015, when he was discharged. On July 1, 2015, Area Plant Supervisor Pete Vielhaber received information that the claimant had reported to work intoxicated. The claimant had already left the garage in his company vehicle by the time Vielhaber arrived. Vielhaber then contacted the claimant and asked him to stop his vehicle and wait for him to arrive at his location. The claimant was courteous and compliant to Vielhaber's request.

When Vielhaber arrived, he observed the claimant walking slowly, his speech was slurred and he smelled of alcohol. Per the employer's policy, Area Plant Supervisor for Design Services Barbara Kendrick also arrived on the location so there would be two supervisors present. She confirmed Vielhaber's observations and brought the documents to be completed in a reasonable suspicion situation. (Employer's Exhibit 6). The claimant told Vielhaber he had a party the night before and had been drinking until 1:00 a.m. He also disclosed he had consumed a fifth of whiskey.

Kendrick contacted labor relations who scheduled the claimant for an alcohol and drug test at an independent testing facility. He was given a breathalyzer which reported a BAC of .116; he was retested 15 minutes later with the same result. (Employer's Exhibit 8). The claimant was also asked to supply a urine sample for a drug test, but was not told for what drugs he was being tested. The drug test came back positive for marijuana. (Employer's Exhibit 7). The claimant was not sent a certified letter, return receipt requested, notifying him of the results of the drug test or of his right to have a second test done at the lab of his choice at his expense.

The claimant was placed on an unpaid suspension. He returned to work on July 14, 2015 and met with Vielhaber and Area Plant Supervisor for Des Moines Curtis Zellmer, who was the claimant's supervisor but was on vacation on July 1. Zellmer handed the claimant a letter notifying him that he was terminated for violating the code of conduct. (Employer's Exhibit 4). This was the claimant's first offense of this nature and he had not received any previous warnings related to similar conduct. The claimant also was not offered any recovery assistance with regard to alcohol abuse.

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. Benefits are allowed.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The employer has the burden of proving disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982).

Iowa law allows drug testing of an employee by a private employer if, among other conditions, the employer has "probable cause to believe that an employee's faculties are impaired on the job." Iowa Code § 730.5. However, the employer's ability to test employees for drugs or alcohol is subject to strict guidelines. An employer, upon a confirmed positive drug or alcohol test by a certified laboratory, is required to notify the employee of the test results and the right to obtain a confirmatory test by certified mail, return receipt requested, before taking disciplinary action against an employee. Iowa Code § 730.5(7)(i)(1). Additionally, the employer is required to offer rehabilitation assistance to an employee after a confirmed positive alcohol test if the employer has over 50 employees, the employee has worked 12 of the previous 18 months, and it is the employee's first infraction. Iowa Code § 730.5(9)(g). 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).

While the employer certainly was within its rights to test and fire the claimant, it failed to provide him sufficient notice of the test results, an opportunity for a split sample test according to the strict and explicit statutory requirements, or the opportunity to seek rehabilitation assistance as required. Thus, the employer cannot use the results of the drug screen as a basis for disqualification from benefits and benefits are allowed.

DECISION:

The August 4, 2015, (reference 01) decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

src/css