

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JEFFRY L WYPICH**  
Claimant

**APPEAL NO. 06A-UI-08914-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OZARK AUTOMOTIVE DISTRIBUTORS INC**  
Employer

**OC: 07/16/06 R: 02  
Claimant: Appellant (2)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Jeffry Wypich filed a timely appeal from the August 24, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 20, 2006. Mr. Wypich participated. Human Resources Supervisor Whitney Smith represented the employer. Employer's Exhibits One through Six were received into evidence.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Jeffry Wypich was employed by Ozark Automotive Distributors as a full-time Maintenance Supervisor from August 30, 2004 until July 10, 2006, when Outbound Operations Manager Dallas Palmer and Human Resources Supervisor Whitney Smith discharged him from the employment after seeking and receiving authorization from the employer's corporate office to do so. The employer operates the O'Reilly Auto Parts chain of retail stores.

The final incident that prompted the discharge occurred on July 10, 2006 concerned a positive breath alcohol test. At 11:15 a.m. Mr. Palmer summoned Mr. Wypich to a meeting to discuss a complaint an employee had made about Mr. Wypich. Mr. Wypich had reprimanded the employee for being absent. The employee and others believed Mr. Wypich had behaved inappropriately in issuing the reprimand. Mr. Palmer had spoken with the complaining employee on the morning of July 10. The complaining employee indicated at that time that Mr. Wypich had been involved in a verbal conflict with another supervisor on the same morning. At the time Mr. Palmer met with Mr. Wypich to discuss these two matters, Mr. Palmer observed that Mr. Wypich had bloodshot eyes, that some of his speech was slurred, and that he smelled of alcohol. Mr. Palmer asked Mr. Wypich if he had been drinking. Mr. Wypich indicated that he had consumed alcohol the night before. Mr. Palmer then contacted Human Resources Supervisor Whitney Smith. Ms. Smith was the only person authorized to request a drug or alcohol test of an employee. Ms. Smith did not make any independent observations of

Mr. Wypich before she requested that Mr. Wypich submit to a breath alcohol test. Instead, Ms. Smith relied upon representations made by Mr. Palmer. Mr. Palmer did not testify at the hearing. Ms. Smith requested that Mr. Wypich submit to a breath alcohol test and Mr. Wypich agreed to do so. Mr. Palmer then transported Mr. Wypich to Concentra for the test. Mr. Wypich provided two breath samples. The first indicated a test result of .108. The second indicated a test result of .105. The employer does not know the name of the machine Concentra used to conduct the breath alcohol tests and did not submit documentation of the tests for the hearing. At 1:00 p.m., Concentra contacted Ms. Smith to advise that Mr. Wypich had provided a positive breath alcohol test. After the test was completed, Mr. Palmer transported Mr. Wypich home. The next day, the employer discharged Mr. Wypich from the employment based on the positive breath alcohol test.

The employer has a written substance abuse policy set forth in a policy manual and in an employee handbook. On August 30, 2004, Mr. Wypich acknowledged receipt of a copy of the employee handbook and further acknowledged receipt of a copy of the employer's substance abuse policy. The Substance Abuse subsection of the employer's Policy Manual was received into evidence as Exhibit Five. The Drug and Alcohol Testing subsection of the employer's Team Member Handbook was received into evidence as Exhibit 6.

#### **REASONING AND CONCLUSIONS OF LAW:**

The question is whether the evidence in the record establishes that Mr. Wypich was discharged for misconduct in connection with the employment. It does not.

Iowa Code section 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.

871 IAC 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 Department of Job Service, 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 is not necessarily 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. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8).

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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

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 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 N.W.2d 581 (Iowa 2003), the 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 a basis for disqualifying a claimant for benefits. In the present case, the employer had reasonable suspicion to request a breath alcohol test, but the employer's written policy failed to comply with Iowa Code section 730.5. Accordingly, the breath test was not authorized by law and cannot serve as a basis for disqualifying Mr. Wypich for unemployment insurance benefits.

Iowa Code section 730.5(1)(i) defines "reasonable suspicion" that would justify a drug test and states, in relevant part, as follows:

*i. "Reasonable suspicion drug or alcohol testing"* means drug or alcohol testing based upon evidence that an employee is using or has used alcohol or other drugs in violation of the employer's written policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. For purposes of this paragraph, facts and inferences may be based upon, but not limited to, any of the following:

- (1) Observable phenomena while at work such as direct observation of alcohol or drug use or abuse or of the physical symptoms or manifestations of being impaired due to alcohol or other drug use.
- (2) Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance.
- (3) A report of alcohol or other drug use provided by a reliable and credible source.

The employer's request for a breath alcohol test was based on information gathered by Outbound Operations Manager Dallas Palmer. Mr. Palmer documented the incident on the day it occurred and that documentation was provided for the hearing. The weight of the evidence demonstrates that Mr. Palmer did in fact have reasonable suspicion that Mr. Wypich had come to work under the influence of alcohol. Mr. Palmer had smelled the strong odor of alcohol and observed Mr. Wypich's bloodshot eyes and slurred speech. Mr. Palmer had reliable information that Mr. Wypich had arrived late for work and had soon thereafter engaged in two heated exchanges with two different employees. Mr. Palmer had Mr. Wypich's admission that he had been drinking the night before.

However, the presence of reasonable suspicion was only one factor to be considered. Other factors set forth at Iowa Code section 730.5 must be considered before the breath alcohol test can serve as a basis for discharging Mr. Wypich from the employment.

Iowa Code section 730.5(9) sets forth requirements the employer's drug testing policy must meet before drug testing will be authorized under the statute. Iowa Code section 730.5(9)(e) provides as follows:

e. 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.

The employer's written policy does not comply with this Code standard and instead indicates that a violation will be established if the sample indicates an alcohol concentration greater than .02.

Iowa Code section 730.5(9)(g) provides as follows:

g. Upon receipt of a confirmed positive alcohol test which indicates an alcohol concentration greater than the concentration level established by the employer pursuant to this section, and 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.

(1) If the employer has an employee benefit plan, the costs of rehabilitation shall be apportioned as provided under the employee benefit plan.

(2) If no employee benefit plan exists and the employee has coverage for any portion of the costs of rehabilitation under any health care plan of the employee, the costs of rehabilitation shall be apportioned as provided by the health care plan with any costs not covered by the plan apportioned equally between the employee and the employer. However, the employer shall not be required to pay more than two thousand dollars toward the costs not covered by the employee's health care plan.

(3) If no employee benefit plan exists and the employee does not have coverage for any portion of the costs of rehabilitation under any health care plan of the employee, the costs of rehabilitation shall be apportioned equally between the employee and the employer. However, the employer shall not be required to pay more than two thousand dollars towards the cost of rehabilitation under this subparagraph.

Rehabilitation required pursuant to this paragraph shall not preclude an employer from taking any adverse employment action against the employee during the rehabilitation based on the employee's failure to comply with any requirements of the rehabilitation, including any action by the employee to invalidate a test sample provided by the employee pursuant to the rehabilitation.

The evidence indicates that this Code provision applied to Mr. Wypich's employment. The employer has more than 50 employees. Mr. Wypich had been in the employment for 22 months. Mr. Wypich had not previously violated the employer's substance and alcohol abuse policy. However, the employer's written policy failed to notify Mr. Wypich that he had the right to discuss, pursue and participate in alcohol abuse rehabilitation prior to being discharged from the employment. Instead, the policy imposed a two-year minimum of employment before the employer would consider exercising its discretion to provide rehabilitation.

Iowa Code section 730.5(9)(h) provides as follows:

*h.* In order to conduct drug or alcohol testing under this section, an employer shall require supervisory personnel of the employer involved with drug or alcohol testing under this section to attend a minimum of two hours of initial training and to attend, on an annual basis thereafter, a minimum of one hour of subsequent training. The training shall include, but is not limited to, information concerning the recognition of evidence of employee alcohol and other drug abuse, the documentation and corroboration of employee alcohol and other drug abuse, and the referral of employees who abuse alcohol or other drugs to the employee assistance program or to the resource file maintained by the employer pursuant to paragraph "c", subparagraph (2).

The record is unclear as to whether Ms. Smith has undergone the primary and supplemental training required by the code. The evidence in the record fails to demonstrate that Mr. Palmer had undergone any such training.

Iowa Code section 730.5(7)(f)(2) prescribes the procedures that must be followed in collecting a breath alcohol sample as follows:

*7. Testing procedures.* All sample collection and testing for drugs or alcohol under this section shall be performed in accordance with the following conditions:

*f.* Drug or alcohol testing shall include confirmation of any initial positive test results. An employer may take adverse employment action, including refusal to hire a prospective employee, based on a confirmed positive test result for drugs or alcohol.

(2) Notwithstanding any provision of this section to the contrary, alcohol testing, including initial and confirmatory testing, may be conducted pursuant to requirements established by the employer's written policy. The written policy shall include requirements governing evidential breath testing devices, alcohol screening devices, and the qualifications for personnel administering initial and confirmatory testing, which shall be consistent with regulations adopted as of January 1, 1999, by the United States department of transportation governing alcohol testing required to be conducted pursuant to the federal Omnibus Transportation Employee Testing Act of 1991.

The employer's written policy indicated that where there is reasonable suspicion warranting a drug and/or alcohol test, "The cause for suspicion will be discussed with the team member and documented on the Observed Behavior/Reasonable Suspicion form (available on the printable e-forms menu)." Ms. Smith testified that she was the only person with authority to request the test and that this was why Mr. Palmer contacted her on August 10. Ms. Smith testified that she

did not discuss the basis for the test with Mr. Wypich in connection with the breath test request, but instead relied upon information provided by Mr. Palmer. The evidence in the record indicates that the employer did not follow its own documentation protocol. In addition, the employer's policy is silent with regard to the breath alcohol testing devices to be utilized during the test and is silent on the qualifications of the personnel authorized to administer the test.

Because the employer's drug and alcohol testing policy did not comply with Iowa Code section 730.5 the breath alcohol test obtained on August 10, 2006, was not authorized by law and cannot serve as a basis for disqualifying Mr. Wypich for unemployment insurance benefits. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Wypich was discharged for no disqualifying reason. Accordingly, Mr. Wypich is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Wypich.

**DECISION:**

The Agency representative's August 24, 2006, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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