

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JONATHAN STEELE
Claimant

ADVANCE SERVICES INC
Employer

APPEAL NO. 18A-UI-07750-B2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 06/17/18
Claimant: Appellant (2)**

Iowa Code § 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated July 10, 2018, reference 02, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on August 28, 2018. Claimant participated personally. Employer participated by Melissa Lewien and Tara Umbarger. Employer's Exhibits 1-7 were admitted into evidence.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on March 5, 2018. Employer discharged claimant on March 6, 2018 because claimant was found to have been intoxicated at work in violation of company rules.

On March 5, 2018 claimant was at work. Claimant stated that he went into employer's office to register a complaint about a coworker's harassment and threats towards claimant. The manager told a human resources officer that he smelled alcohol and witnessed an unsteady gait from claimant. The manager or human resources officer sent claimant to a local hospital for testing.

Whereas the testing done was stated by claimant to be a breathalyzer test, the testing document and employer's first witness indicated that a blood test was performed. (Employer's Exhibit 2). Claimant tested well above the .02 blood alcohol concentration (bac) employer states in its documentation is worthy of suspension, with claimant's tests coming back at or over .350 bac. Claimant was not formally notified of his results by certified written notice or given an option for outside testing. Employer pointed out how high above the limit claimant's results were and also pointed out the area on the form where claimant signed that stated, "I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form."

Employer argues that this shows claimant agreed with the results and therefore doesn't have grounds to challenge the results.

Employer did not make available for the hearing anyone who came into contact with claimant on March 5, 2018.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

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 § 96.5-2-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. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a.

In order to establish misconduct as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871

IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa Ct. App. 1986). The conduct must show a 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 the employee's duties and obligations to the employer. Rule 871 IAC 24.32(1)a; *Huntoon supra*; *Henry supra*. In contrast, 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 deemed misconduct within the meaning of the statute. Rule 871 IAC 24.32(1)a; *Huntoon supra*; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

The employer bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers*, 462 N.W.2d at 737. The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd.*, 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

Iowa Code section 730.5(8) sets forth the circumstances under which an employer may test employees for the presence of drugs. Iowa Code § 730.5(7)(i)(1) mandates that an employer, upon a confirmed positive drug or alcohol test by a certified laboratory, notify the employee of the test results by certified mail and the right to obtain a confirmatory test before taking disciplinary action against an employee. Upon a positive drug screen, Iowa Code § 730.5(9)(g) requires, under certain circumstances, that an employer offer substance abuse evaluation and treatment to an employee the first time the employee has a positive drug test.

Iowa law requires substantial rather than strict compliance with the requirements of Iowa Code §730.5. Those directives which must be complied with include, "mandating written notice by certified mail of (1) any positive drug test, (2) the employee's right to obtain a confirmatory test, and (3) the fee payable by the employee to the employer for reimbursement of the expense of the test. Iowa Code §730.5(7)(i)(1). *Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 338 (Iowa 2009). 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 Employment Appeal Board*, 602 N.W.2d 553, 557, 558 (Iowa 1999).

The last incident, which brought about the discharge fails to constitute misconduct because claimant was not sent notice of his rights by certified mail. This requirement is mandatory. There is no alternate method of notice allowed. In person notice of rights is not sufficient. The Iowa Courts have held that certified mail notice is mandatory. *Harrison v. Employment Appeal Board*, 659 N.W.2d 581 (IA 2003). The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated July 10, 2018, reference 02, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

Blair A. Bennett
Administrative Law Judge

Decision Dated and Mailed

bab/rvs