

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

TERRANZO A FOSTER
APT 26
2902 IOWA ST
PERRY IA 50220-2441

TYSON FRESH MEATS INC
c/o TALX UCM SERVICES
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-03252-DT
OC: 02/19/06 R: 02
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Tyson Fresh Meats, Inc. (employer) appealed a representative's March 8, 2006 decision (reference 01) that concluded Terranzo A. Foster (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 10, 2006. The claimant participated in the hearing. Tom Barragan appeared on the employer's behalf and presented testimony from two other witnesses, Mike Cleaver and Edward Orr. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

FINDINGS OF FACT:

The claimant started working for the employer on December 13, 2004. He worked full time as a production worker in the employer's Perry, Iowa meat processing facility. His last day of work was February 20, 2006. The employer discharged him on that date. The reason asserted for the discharge was violation of the employer's drug and alcohol policy.

The claimant's work schedule was 8:00 a.m. to 5:00 p.m., Monday through Friday. On February 7, 2006, the claimant worked until approximately 11:00 a.m. when he was sent to health services for an injury recheck. While he was there, he was told that two supervisors, neither of whom were his regular supervisor, had made a determination of reasonable suspicion of his being under the influence of some substance based upon stated conclusions of rambling speech, hyperactive physical behavior, droopy eyes, flushed face, and a smell of alcohol on his breath. He was then directed to submit to a breath and urine screening.

The employer's drug and alcohol policy specifies the alcohol concentration for violation to be .04. However, the employer's testing device considers a finding of .02 or more to be "positive." The claimant performed the breath test twice with results of .030 and .027. Had those been the only results, the claimant would have been sent home and directed to return the next day and given the opportunity to retake the test with anticipation the result would have been less than .02 so that it would not have registered.

However, the claimant was also directed to submit a urine sample into a drug screening kit container. There was no split sample taken or retained. The screening on the built-in test strip for the container indicated positive for marijuana. As a result, the claimant was sent home for the day and told to return the next day to discuss options. On February 8 he was told he could be discharged or he could accept rehabilitation, either self monitored or professionally monitored. The claimant agreed to do a self-monitored rehabilitation and indicated he would seek to return to duty on February 20, 2006 and submit to a retest, with the belief that any marijuana to which he might have been exposed would be out of his system by then.

The claimant returned and submitted to a retest again utilizing the drug screening kit. Again, the screening on the built-in test strip for the container indicated positive for marijuana. No split sample was taken or retained. As a result, the claimant was informed he was discharged.

REASONING AND CONCLUSIONS OF LAW:

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. 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).

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 reason cited by the employer for discharging the claimant is a violation of the employer's drug and alcohol policy. In order for a violation of an employer's drug or alcohol policy to be disqualifying misconduct, it must be based on a drug test performed in compliance with Iowa's drug testing laws. Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003); Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553, 558 (Iowa 1999). The drug testing laws exist as a legislatively determined balance between the interests of the employer and the privacy and accuracy issues of employees. The Eaton 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. In Harrison, the court specifically noted the statutory requirement that the employer must give the employee a written notice of the positive drug test, sent by certified mail, return receipt requested, informing the employee of his right to have the split sample tested at a laboratory of his choice and at a cost consistent with the employer's cost. Here, the employer did not provide any written notice, by certified mail or otherwise.

Most importantly, the drug screening kit process utilized by the employer is not recognized under the Iowa statute, which specifies that an employer may only take "adverse employment action" . . . based on a confirmed positive drug or alcohol test." Iowa Code § 730.5(7)(f). Confirmatory testing is to be "conducted at a laboratory certified by the United States department of health and human services' substance abuse and mental health services administration or approved under rules adopted by the Iowa department of public health," not in the employer's own facility. Iowa Code § 730.5(7)(e). Finally, the confirmatory drug or alcohol test shall be a chromatographic technique such as gas chromatography/mass spectrometry, or another comparably reliable analytical method." Iowa Code §730.5(7)(f)(1). Here, the employer based its termination decision, an "adverse employment action," on the result of a drug screening which does not comply with the requirement for a confirming testing analysis.

The employer has not substantially complied with the drug testing regulations. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's March 8, 2006 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

ld/pjs