IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KEVIN M ANDERSEN SR
Claimant

BE & K CONSTRUCTION COMPANY
Employer

APPEAL NO. 10A-UI-04869-VST

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/07/10
Claimant: Appellant (1)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated March 26, 2010, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on May 11, 2010. Claimant participated. Employer participated by Cheryl Clark, office manager, and Tony Webster, safety manager. The record consists of the testimony of Cheryl Clark; the testimony of Tony Webster; the testimony of Kevin Andersen Sr.; Claimant's Exhibit A; and Employer's Exhibits 1-16. The record was reopened by the administrative law judge to take additional testimony from Cheryl Clark and Kevin Andersen. That testimony was received on June 2, 2010. Both the claimant and Ms. Clark were present.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is an industrial contractor located on the ADM site in Clinton, Iowa. The employer had 156 employees at the time of the claimant's termination. The claimant was hired on June 26, 2006, as a full time civil supervisor. He was continuously employed until the date of his termination on March 8, 2010.

The claimant was terminated after he failed a random substance abuse test. The employer has a written drug, alcohol and substance abuse policy which prohibits and/or regulates the use of alcohol and intoxicating beverages by employees while engaged in company activities. If an individual has a confirmed positive alcohol test of .04 or greater on the first confirmed test, the employer's written policy states that the employee will be terminated. In addition, the policy states that if the employee desires future employment consideration with the company, the employee will be referred to the Employee Assistance Program (EAP) ;and that a minimum of

thirty consecutive days must pass from the date of the last confirmed positive; and the employee must agree to comply with all treatment and aftercare recommendations of the EAP. (Ex. 13) The claimant acknowledged in writing that he had received the mandatory drug and alcohol operating criteria and that he agreed to abide by all company policies regarding drug and alcohol abuse.

On March 8, 2010, the claimant was asked to take a random alcohol and drug test. The claimant had been advised in writing on how random substance abuse testing would take place. The testing protocol was as follows:

"We use a data base in which all employees are listed in alphabetical order and numbered sequentially (1, 2, 3 etc), not employee badge order. The lab uses a computer generated random number selection program and from this program and from this program (total employee population) the lab generates a list of numbers that are then matched to names. These employees are then given random substance abuse tests."

(Exhibit 6)

When the employer receives a list of employees randomly selected, the employer notifies the employees and within 45 minutes takes those employees to Medical Associates in Clinton, Iowa. The claimant was given a breath test by an alcohol technician. The first result showed a level of .052 at 8:43 a.m. A second test was done at 9:01 a.m. This test was also positive at .050.

Since the claimant's test for alcohol was positive, the employer made certain that the claimant got home safely. The claimant was informed that he was terminated and he was offered an EAP program. The claimant elected to participate in the employer's EAP program and plans to finish the program on June 4, 2010. The claimant has never tested positive for alcohol prior to March 8, 2010.

REASONING AND CONCLUSIONS OF LAW:

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.

The Iowa Supreme Court has ruled that an employer cannot establish disqualifying misconduct based on a drug or alcohol test performed in violation of Iowa's drug and alcohol testing laws. Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003); Eaton v. Employment Appeal Board, 602 N.W.2d 553, 558 (Iowa 1999). As the court in Eaton stated, "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.

Iowa's drug and alcohol testing law states that an employer's written policy shall provide for alcohol rehabilitation for an employee who has a confirmed positive alcohol test under the following conditions: (1) the employer has at least 50 employees; (2) the employee has been employed by the employer for at least 12 of the preceding 18 months, (3) rehabilitation is agreed upon by the employee, and (4) the employee has not previously violated the employer's substance abuse policy pursuant to this section. Iowa Code section 730.5-g.

The evidence in this case established that the employer fully complied with Iowa's drug and alcohol testing law insofar as setting forth its policy in writing; how the random sampling was determined; and how the testing was conducted. The employer offered the claimant rehabilitation through an Employee Assistance Program, which the claimant accepted, and the claimant is almost finished with the EAP program. The claimant had never violated the employer's substance policy prior to his positive test on March 8, 2010.

The very difficult legal issue that is present in this case concerns the interpretation of two different sections of Iowa Code section 730.5. Since the employer had more than fifty employees, section 730.5(9)(g) requires that the rehabilitation be offered to the employer if certain other conditions are met. This portion of the statute concludes with the following words:

> 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.

Read in isolation, this section of statute might suggest that if an employee is offered and accepts rehabilitation and fully complies with rehabilitation, that an employer cannot discharge an employee. This reading might in turn lead to the conclusion that a claimant who was discharged, even though compliant with rehabilitation, could not be denied unemployment insurance benefits based on misconduct. See also 730.5(9)(b)(requires that the employer's written policy state that adverse employment action not be taken so long as the employee complies with requirements of rehabilitation and successfully completes rehabilitation)

Such a conclusion would be at odds with Section 930.5(10)a. That section of the statute, entitled disciplinary procedures, provides in pertinent part:

> a. Upon receipt of a confirmed positive test result for drugs or alcohol which indicates a violation of the employer's written policy,…an employer may use that test result…as a valid basis for disciplinary or rehabilitative action pursuant to the requirements of the employer's written policy and the requirements of this section, which may include, among other actions, the following:
>
> (3) Termination of employment.

The employer is permitted, therefore, to terminate an employee if that employee has a positive test for alcohol so long as the employer's written policy permitted that discipline and so long as the employer fully complied with section 730.5. The employer's policy provides for termination if the confirmed test results are .04 or greater. (Exhibit 12). The claimant's two confirmed tests were .052 and .05.

The administrative law judge concludes, after carefully reviewing the statutory language and the employer's policies, that the statutory obligation to offer rehabilitation does not mean that a claimant may receive unemployment insurance benefits if he or she is discharged for a first positive test. The receipt of unemployment benefits should not depend on the size of the employer, which is the effective result if a different rule is applied to an employer with fifty employees than to one with less. A more reasonable reading of the statute is that the legislature intended that certain employers and certain employees should be given rehabilitation on a first positive test for alcohol. Rehabilitation in the statute refers to actual treatment for alcohol abuse and does not extend to a requirement that employee be retained or awarded unemployment benefits.

The greater weight of the evidence is that the employer fully complied with Iowa Code section 730.5. The claimant tested positive for alcohol in violation of his employer's substance abuse policy, of which he was fully aware. An employer has an obligation to provide a safe workplace and can reasonably expect that its employees will not be impaired by alcohol or drugs. The claimant's explanation that his positive test was affected by taking Nyquil or his personal medical condition is not persuasive. The claimant acknowledged having consumed alcohol prior to the test and stated that since he had diabetes, perhaps his body did not get rid of the alcohol as quickly. He offered no medical evidence to corroborate his testimony.

The administrative law judge concludes that the employer has established misconduct. Benefits are denied.

DECISION:

The decision of the representative dated March 26, 2010, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

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Vicki L. Seeck
Administrative Law Judge

_____
Decision Dated and Mailed

vls/pjs