IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

JERRALE D WILLIAMS Claimant **QHC FORT DODGE VILLA LLC** Employer	**APPEAL NO. 14A-UI-07884-SWT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/06/14** **Claimant: Appellant (2)**

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated July 25, 2014, reference 01, that concluded he was discharged for work-connected misconduct. A telephone hearing was held on August 21, 2014. The parties were properly notified about the hearing. The claimant participated in the hearing. Cindy Corson participated in the hearing on behalf of the employer with a witness, Terry Cooper. Exhibits One through Six were admitted into evidence at the hearing.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked full time for the employer as an activities assistant from September 15, 2012, to July 3, 2014. He was required to drive as part of his job. He was informed and understood that under the employer's work rules, employees were required to submit to a drug test under certain circumstances, including when an employee is reasonably believed to be using a controlled substance, and were subject to termination if they tested positive for drugs. The administrator was Debra Koenig.

All supervisory personnel of the employer involved with drug or alcohol testing have not attended a minimum of two hours of initial training and subsequent annual training that includes 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 an employee assistance program or resource file maintained by the employer. For example, administrative assistant, Cindy Corson, who handled the testing for the employer in this case, was unaware of any such training given to her or other employees who handle drug testing matters.

The employer never notified the claimant that the employer had a resource file of alcohol and other drug abuse programs, mental health providers, or other entities available to assist employees with personal or behavioral problems.

The claimant was arrested for operating a vehicle while intoxicated (OWI) in November 2013, which was the result of a positive urine test for marijuana and was while he was off-duty in his personal vehicle. He was not immediately charged for the offense. He ended up pleading guilty to OWI in March 2014 and received a deferred judgment. He kept Debra Koenig informed about the charge and the outcome. The claimant was not required to submit to drug or alcohol testing at that time and was allowed to continue to work and drive for the employer.

The employer required the claimant to go through a criminal record check due to the OWI conviction. In a statement responding to this criminal record check, he explained about the OWI and that it was due to a positive marijuana test. He stated that he had not smoked marijuana in past three months.

As a result of the statement, Cindy Corson informed the claimant that he was required to submit to a drug test based on the reasonable suspicion policy, which states that a report by a reliable and credible source of substance abuse can trigger a drug test.

Carson transported the claimant to the clinic for drug testing. During the trip, the claimant admitted that he had used marijuana within the past two weeks and that the drug screen would not come back clean but he agreed to take the test anyway.

A urine sample was properly taken from the claimant and properly analyzed using an initial drug screen test and subsequent confirmatory test by a certified laboratory, reviewed by a medical review officer. The analysis disclosed the presence of marijuana in the claimant's system. The employer discharged the claimant on July 8, 2014, after it received the results of the drug test for testing positive for marijuana.

Koenig prepared a letter informing the claimant about the result of the test and his right to have a split sample tested. The letter did not inform him about the cost of the test but instead said the cost would be the same as what the employer paid for the first test. The employer did not send the claimant a letter by certified mail, return receipt requested but instead gave him a letter during a meeting on July 8, 2014. The claimant did not request to have the split sample tested.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

The Iowa Supreme Court has ruled that an employer cannot establish disqualifying misconduct based on a drug test performed in violation of Iowa's drug 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 law provides for drug testing based on “reasonable suspicion,” which is defined in Iowa Code § 730.5-1-h as testing based upon evidence that an employee is using or has used alcohol or other drugs drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. The statute goes on to provide examples of reasonable suspicion, including (1) direct observation of drug use or manifestations of being impaired due to drug use, (2) erratic behavior or significant job performance deterioration, (3) a report of drug use provided by a reliable and credible source, (4) evidence of drug test tampering, (5) evidence of a work-related injury, or (6) evidence that a employee manufactured, sold, distributed, solicited, possessed, used, or transferred drugs while working or while on the employer's premises. Iowa Code § 730.5-1-h.

The claimant argued that the employer had no reasonable suspicion that he was currently using drugs. The employer relied on (3) above for the basis for reasonable suspicion using the claimant’s admission of smoking marijuana three months earlier. I conclude this does satisfy the law’s requirement of a “report of drug use provided by a reliable and credible source.”

On the other hand, the employer violated Iowa Code § 730.5-7-i by failing to notify the claimant in writing by certified mail, return receipt requested, of the results of the test and his right to have the split sample of his collected urine tested at his request along with the actual cost of that test. These requirements were deemed mandatory in *Harrison v. Employment Appeal Board*. In addition, it is clear from the testimony of Cindy Corson, who handling the testing for the employer in this case, that no formal training as required by Iowa Code § 730.5-9-h was given to all the staff involved in drug testing. I believe the claimant’s testimony that he was never notified by the employer of an employee assistant program or resource file to assist employees with personal or behavioral problems, which violates Iowa Code § 730.5-9-c.

Finally, the claimant admitted to Corson on the way to the clinic that he had used marijuana within the past two weeks. In the *Eaton* case, however, the Iowa Supreme Court focused on whether the drug test complied with the law and not whether the claimant had admitted to using drugs. This was because the reason for the discharge was the positive test result. Likewise, in this case, the claimant was discharged due to the positive test result not his admission.

Based on these multiple violations of Iowa’s drug testing laws, the claimant was not discharged for work-connected misconduct under the unemployment insurance law.

DECISION:

The unemployment insurance decision dated July 25, 2014, reference 01, is reversed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Steven A. Wise
Administrative Law Judge

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Decision Dated and Mailed

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