

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARK A HOWARD
Claimant

APPEAL NO. 14A-UI-00036-VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

BLUE RIDGE PAPER PRODUCTS INC
Employer

OC: 12/08/13
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated December 26, 2013, reference 01, which held that the claimant was ineligible for unemployment insurance benefits. After due notice, a hearing was held on February 13, 2014, in Davenport, Iowa. The claimant participated personally. Employer participated by Megan Danner, human resources manager. The record consists of the testimony of Megan Danner; the testimony of Mark Howard; and Employer's Exhibits 1-9.

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 a beverage packing and converting facility located in Clinton, Iowa. The employer has a total of 113 employees. The claimant was hired on July 6, 1992. He held a variety of production jobs. His last day of actual work was November 27, 2013. He was working as a "knife" person. He was suspended after he failed a breathalyzer test for alcohol. He was suspended pending further investigation and was terminated on December 6, 2013.

When the claimant came to work on November 27, 2013, two employees reported that the claimant appeared to be under the influence of alcohol. He smelt of alcohol according to one employee and appeared to have glassy eyes. The employer felt that this constituted reasonable suspicion that the claimant had reported to work under the influence of alcohol. The claimant consented to a breathalyzer test. The test was done at Clinton Occupational Health. Approximately 30 to 35 minutes passed between the first report and the actual test being done.

Two samples were taken. The first sample showed a level of .226 and the second sample was .222. The claimant was informed about the results of the test. The claimant had had four drinks between 9:00 a.m. and 2:00 p.m. prior to reporting work.

The employer does not provide EAP advice or rehabilitation for first time offenders of its drug and alcohol policy when there is reasonable suspicion as opposed to mandatory testing after an accident. This policy is contained in its collective bargaining agreement. The employer has a zero tolerance for violation of the policy. The claimant has filed a grievance and is waiting for a date when the arbitration will take place.

The claimant has never had a positive alcohol test prior to the test in this case.

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.

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 Sims v. NCI Holding Corp, 759 N.W. 2d 333, 338 (Iowa

2009), the court held that substantial compliance with the statute was required before a drug test request or drug test may serve as a basis for disqualifying an employee for unemployment insurance benefits.

One of the requirements for a legal drug test in Iowa is that there be a rehabilitation program for a worker who has been with the employer for at least 12 months if the employer has 50 or more employees. Iowa Code section 730.5-9-g(1) This statutory provision requires rehabilitation with allocation and limitations of costs. This section applies only to the first violation of the employer's drug and alcohol policy. In this case, the employer terminated the claimant and did not offer him rehabilitation as required by the statute. This failure means that the alcohol test was illegal and cannot be the basis for disqualifying the claimant for unemployment insurance benefits. Benefits are therefore allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated December 26, 2013, reference 01, is reversed Unemployment insurance benefits are allowed, if the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs