IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TROY S UTECH
Claimant

ECONOMY COATING SYSTEMS INC
Employer

APPEAL NO. 09A-UI-02882-E2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/18/08
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated February 19, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on March 16, 2009. Claimant participated personally. Employer participated by Robin Genco-Marucci and Jeff Huling. Exhibit One, pages 1 through 11, was 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 January 23, 2009.

Claimant was discharged on January 23, 2009 by employer because the employer believed the claimant refused a second urine sample for drug testing after being requested by the employer.

The employer has a written substance abuse policy set forth in a drug free workplace manual (Exhibit 1, pages 3-9). Mr. Utech acknowledged in writing receiving a copy of the manual. (Exhibit 1, page 2). Under company policy employees who refuse to be drug tested based on reasonable suspicion are subject to discharge. A co-employee, Tim Doyle, reported to Jeff Huling, Plant Manager, the claimant smelled of marijuana. The employer had no knowledge of whether the co-employee had any training which would allow him to reach such a conclusion. The claimant and the co-employee did not get along and had personality disputes and Mr. Huling had to speak to them both in the past. There was no evidence to show that Mr. Doyle was a reliable or credible source. Mr. Huling noted the claimant, who was a welder, had red eyes. Mr. Huling conferred with Rod Luckritz, Quality Assurance Officer, and Ms. Robin

Genco-Marcucci and decided to send the claimant and one other employee for drug testing. Matt Lubben, Safety Manager, took the claimant for the drug test. The drug test was conducted at the chiropractor's office of Brian Cadogan, D.C. The claimant voluntarily went to the test. There was no evidence provided that Dr. Cadogan was certified for testing by the U. S. Department of Health and Human Services Substance Abuse and Mental Health Department or the Iowa Department of Public Health. The first sample was not usable. The office asked for a second sample. The doctor's office indicated it would take a while for the other test. The claimant wanted to use his own doctor for the test and asked Matt Lubben if that was possible. Mr. Lubben did not know. The claimant called Jeff Huling and asked if he could use his own doctor. Mr. Huling did not know. The claimant called Ms. Robin Genco-Marcucci who was not available. The claimant returned to work. He was fired for refusing to provide a second sample. The employer did not provide any direct evidence they had told the claimant he could not use his own doctor and had to return to Dr. Cadogan's office to provide a second sample. The employer provided hearsay testimony that a call was made to Matt Lubben to tell the claimant he had to take a second test at Dr. Cadogan's. Mr. Lubben and Mr. Luckritz did not testify. The claimant denied he had been told by Mr. Lubben or Mr. Luckritz he had to provide the second sample at Dr. Cadogan's office.

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 employer has the burden of proof in this matter. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa 1992).

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant allegedly violated employer's policy concerning drug testing. Claimant was asked if he could have his test done by his own doctor. The claimant asked for direction from Jeff Huling and Matt Lubben on this issue and they did not know the answer to this question. He returned to work and was fired for refusing to provide a second sample and was then told he could not use his own doctor.

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. The court has required at least substantial compliance with this law. Harrison, 659 N.W.2d at 586.

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. Iowa 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 the 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 requirement for the drug test the test could not serve as a basis for disqualifying the claimant for benefits.

The testing of the claimant was not a random testing but based upon the employer's assertion that they had a reasonable suspicion. The employer's policy on "reasonable suspension" mirrors the Iowa Code.

Iowa Code section 730.5(1)(h) defines "reasonable suspicion" that would justify a drug test and states in relevant part as follows:

> h. "Reasonable suspicion drug or alcohol testing" means drug or alcohol testing based upon evidence that an employee is using or has used alcohol or other drugs in violation of the employer's written policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. For purposes of this paragraph, facts and inferences may be based upon but not limited to any of the following:

(1) Observable phenomena while at work such as direct observation of alcohol or drug use or abuse or the physical symptoms of manifestations of being impaired due to alcohol or other drug use.

(2) Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance.

(3) A report of alcohol or other drug use provided by a reliable and credible source.

The employer based the decision on the allegation of another employee. The employer knew the claimant and the co-employee did not get along. The employer acknowledged that the employee who made the report had no training on identifying drugs. There was no evidence the co-employee had provided reliable information in the past about drug usage or was a credible source in any matter. The employer did not have a reasonable suspicion under the law to refer the claimant for drug testing. The employer, Jeff Huling, stated he noticed the claimant had red eyes, but it is noted the claimant was welding that morning for the employer. The employer's request for drug testing was based upon an observation by an untrained employee. Mr. Huling did not testify to any observed drug use or observed any physical symptoms or manifestations of being impaired due to drug use on the part of Mr. Utech. Mr. Huling did not observe any abnormal conduct or erratic behavior while at work or any deterioration in the claimant's work performance.

Iowa Code 730.5 (7)(e) provides:

> All confirmatory drug testing shall 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.

The employer did not provide competent evidence the office they sent the claimant to met the certification required by Iowa Code 705.5 (7) (e).

Because the employer's drug and alcohol testing policy did not substantially comply with Iowa Code section 730.5, it was not authorized by law and the claimant's refusal to be tested under its provisions cannot serve as a basis for disqualifying Mr. Utech from unemployment insurance benefits.

Even if the testing was valid, the employer failed to prove the claimant committed misconduct. The employee credibly testified he had asked if he could have his own doctor perform testing. His supervisors could not answer his question and the claimant attempted to call his superiors to determine an answer. The record does not show the claimant had refused a drug test at the time he was fired. The employer's testimony was not more convincing than the claimant's. The employer has the burden of proof. The employer provided hearsay testimony of Mr. Lubben and Mr. Luckritz the claimant was told to provide a second sample. They did not testify at the hearing. While hearsay is admissible it did not satisfy the burden of proof in this case. If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976).

Based upon the evidence in the record and the application of the appropriate law, the administrative law judge concludes that Mr. Utech was discharged for no disqualifying reason.

Accordingly, Mr. Utech is eligible for benefits providing that he meets all other eligibility requirements.

DECISION:

The decision of the representative dated February 19, 2009, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

_____
James Elliott
Administrative Law Judge

_____
Decision Dated and Mailed

jfe/css