IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CHRISTOPHER PATTERSON Claimant	**APPEAL NO. 11A-UI-10890-SWT**
	ADMINISTRATIVE LAW JUDGE DECISION
TYSON FRESH MEATS INC Employer	
	OC: 07/17/11 **Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated August 8, 2011, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on September 12, 2011. The parties were properly notified about the hearing. The claimant participated in the hearing. Chris Travis participated in the hearing on behalf of the employer. Exhibits One through Five were admitted into evidence at the hearing.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked for the employer as a production worker from October 16, 2007, to July 11, 2011. He was informed and understood that under the employer's written policy, which he received, employees are required to submit to alcohol testing under certain circumstances, including when an employee is reasonably believed to be under the influence of alcohol. Employees are given the opportunity to obtain professional treatment or self-rehabilitation themselves after they test positive for alcohol the first time. Employees are subject to discharge if they tested positive for alcohol a second time.

Pursuant to the policy, the claimant was required to submit to a reasonable suspicion breathalyzer test on August 8, 2008. Because he had a confirmed positive test for alcohol, he was suspended and given the opportunity to obtain alcohol treatment or self-rehabilitation. He chose self-rehabilitation and after being off work for a period of time, he successfully passed a drug and alcohol test and returned to work. He knew that he would be discharged if he again tested positive for alcohol.

On the morning of July 11, 2011, the claimant was required to submit to drug and alcohol testing after a supervisor detected the smell of alcohol coming from the claimant. He also observed the claimant appeared nervous and confused, his speech was slurred, and his eyes appeared glassy. Another supervisor made similar observations, which caused them to suspect the

claimant was under the influence of alcohol. The supervisors had received annual training on recognizing the signs of intoxication.

In accordance with the policy, the claimant was asked to submit to a breathalyzer test administrated by a company nurse, who is a qualified breath alcohol technician using an approved breath testing device. The claimant was given an initial test, with a test result of .277, and after a 32-minute wait, a confirmatory test, with a test result of .276. Both tests were considered positive for alcohol under the employer's alcohol policy, but there is no information in the record about what the threshold is for a positive test under the employer's policy.

The claimant also was required to provide a urine sample for drug testing on July 11, 2011, and the sample was split and sent to a certified laboratory. The employer's representative was unknowledgeable about the type of testing used. The testing was reported as positive by the laboratory and the test results were reviewed by a medical review officer, but the employer's representative was unsure what substance the claimant tested positive for. No letter was sent to the claimant notifying him about the result of test and his right to have a split sample of the urine collected tested.

On July 18, 2011, the employer discharged the claimant due to his second violation of its alcohol policy and positive drug test result.

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 drug or alcohol testing performed in violation of Iowa law. *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 evidence establishes the claimant had a positive test result under the employer's alcohol policy on July 11, 2011. The claimant argued that some of things relied on by the supervisors were not really signs of intoxication for him because, for example, he has an eye condition that makes his eyes appear glassy and has dental problems that affect his speech. Despite this, I believe the supervisors had reasonable suspicion to ask for an alcohol test. The next question is whether the employer complied with the alcohol-testing procedures of Iowa Code § 730.5. The law provides that "If the written policy provides for alcohol testing, the employer shall establish in the written policy a standard for alcohol concentration which shall be deemed to violate the policy. The standard for alcohol concentration shall not be less than .04, expressed

in terms of grams of alcohol per two hundred ten liters of breath, or its equivalent." Iowa Code § 730.5-9-e. The employer's representative did not know the threshold for a positive test result under the employer's written policy, and the policy was not sent in for the hearing. I conclude under the precedent of *Eaton* and *Harrison*, that the employer failed to meet its burden of showing it complied with the requirements of Iowa Code § 730.5 in regard to its alcohol-testing process due to the lack of information about the written policy. The claimant, therefore, is not subject to disqualification for his alcohol-test results.

The next question is whether the employer complied with the drug-testing procedures of Iowa Code § 730.5. One requirement of the statute is for employers to notify employees by certified mail, return receipt requested, of the test results and their right to have an independent test performed on the second sample at an approved laboratory. Iowa Code § 730.5-7-i(1). In this case, the employer failed to notify the claimant by certified (or regular) mail of the results of the test and the right to have an independent test conducted on the split sample. The employer's representative was not even sure what drug the claimant tested positive for and the test results submitted into evidence redacted that information. No proof was presented that the sample was analyzed using an initial drug screen followed by a confirmatory test using a chromatographic or other comparably reliable technique in accordance with the procedures required by Iowa Code § 730.5-7-e & -f.

The claimant is not subject to disqualification because the testing procedures used by the employer did not comply with state law. See *Eaton*, 602 N.W.2d at 558.

DECISION:

The unemployment insurance decision dated August 8, 2011, reference 01, is affirmed. 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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