

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUSTIN C CLEPPE
Claimant

APPEAL NO. 13A-UI-00238-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AEROTEK INC
Employer

OC: 11/04/12
Claimant: Appellant (2)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated December 28, 2012, reference 02, that concluded he was discharged for work-connected misconduct. A telephone hearing was held on February 13, 2013. The parties were properly notified about the hearing. The claimant participated in the hearing. No one participated in the hearing on behalf of the employer.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The employer is a staffing company that provides workers to client businesses on a temporary or indefinite basis. The claimant worked for the employer on an assignment at McLanahan Corporation as a CRC Lathe programmer from April 14, 2012, to November 9, 2012. McLanahan's is in Cedar Rapids, Iowa.

The claimant had never received a copy of the employer's or McLanahan Corporation's work rules or policies. He had never received a copy of any drug or alcohol testing policy or policy regarding drug or alcohol use.

The claimant had worked the night shift on November 8 until 11:00 p.m. After he left work, he drank some alcohol. He did not expect to have to work until 2:30 p.m. At about 3:00 a.m., the claimant received a call from work asking him to report to work at 10:00 a.m. to train on a new machine. He agreed to come in at 10:00 a.m.

When the claimant reported to work, he was not impaired by alcohol but had some alcohol in his system. After the training, the claimant attended a meeting. After the meeting, a supervisor at McLanahan's asked him to go in for a breathalyzer test for alcohol. He then reported to an occupational health clinic and submitted to a breathalyzer test for alcohol. The person who conducted the test said that the test results were below the legal limit in Iowa, but displays some alcohol in his system.

The employer told the claimant that he was discharged because of McLanahan's zero-tolerance policy for alcohol and drugs.

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 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.

Employers are not allowed to test employees unless a written policy has been provided to every employee subject to testing. Iowa Code § 730.5-9-a(1). If the written policy provides for alcohol testing, the employer shall establish in the written policy a standard for alcohol concentration that cannot be less than .04, expressed in terms of grams of alcohol per 210 liters of breath. Iowa Code § 730.5-9-e.

The testing of the claimant violated at a minimum Iowa Code § 730.5-9-a(1) and violated Iowa Code § 730.5-9-e if the person conducting the test meant that the results were below .04 g/210 liters of breath. Since the employer did not participate in the hearing, the actual results are unknown. Iowa law does not permit a zero alcohol-content limit.

Since the claimant's testing violated Iowa law, he is not disqualified from receiving unemployment insurance benefits based on the reasons for his separation from employment.

DECISION:

The unemployment insurance decision dated December 28, 2012, reference 02, is reversed.
The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

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