

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BERNARD S DUFFY**  
Claimant

**APPEAL NO. 16A-UI-11861-TN-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BROCK INDUSTRIAL SERVICES LLC**  
Employer

**OC: 10/02/16**  
**Claimant: Respondent (1)**

Section 96.5-2-a - Discharge

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from a representative's decision dated October 24, 2016, reference 01, which held claimant eligible to receive unemployment insurance benefits finding the claimant was dismissed from work on July 29, 2016 under non disqualifying conditions. After due notice was provided, a telephone hearing was held on November 16, 2016. Although the claimant was notified, he did not participate. The employer participated by Ms. Dishara Holt, Human Resource Representative, and witnesses: Mr. Todd Honchell and Mr. Scott DelRio.

**ISSUE:**

The issue is whether the claimant was discharged for conduct constituting misconduct within the meaning of the Iowa Employment Security Act.

**FINDINGS OF FACT:**

Having considered the evidence in the record, the administrative law judge finds: Bernard Duffy was employed by Brock Industrial Services, LLC from May 23, 2016 until July 29, 2016 when he was discharged from employment for failure to pass an alcohol screen. Mr. Duffy was employed as a full-time carpenter and was paid by the hour.

On July 29, 2016, Mr. Duffy was taken to the company on-site nurse after reporting dizziness related to a work incident that day. Because the company considered the incident to be that of a "injury" the claimant was subject to drug and alcohol screening under the provisions of the company's written drug and alcohol testing policies.

The alcohol screening was done by a breathalyzer and saliva testing. The company's written drug and alcohol testing policy set the normal level of acceptable concentration at .020. Because the claimant's test results showed an alcohol concentration in excess of .049 for saliva and .020 for breathalyzer, he was discharged from employment. Mr. Duffy had no explanation for the positive results which exceeded the levels set by the employer in its written policy. Although the company has a rehabilitation or alcohol awareness program in place, the company witnesses were unfamiliar with the exact nature of the policies. The employer's witnesses

confirmed the saliva test was taken by the nurse and a breathalyzer test but could provide no further information about the test, qualifications for the personnel administering the test or confirmatory testing.

#### **REASONING AND CONCLUSIONS OF LAW:**

The employer has the burden of proof in this matter. See Iowa Code 96.5-2. Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the 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 Ct. of Appeals 1992).

Allegations of misconduct without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4).

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 court of Iowa considered the statute and held "that an illegal drug test cannot provide a basis to render an employee illegible for unemployment compensation benefits." Thereafter, in Harrison v. Employment Appeal Board, 659 NW 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 the basis for disqualifying a claimant for benefits. In the present case, the employer had reasonable suspicion to request a breath alcohol test but the employer's written policy failed to comply with Iowa Code section 730.5. Accordingly, the breath test was not authorized by law and cannot serve as the basis to disqualify Mr. Duffy for unemployment insurance benefits.

Section 730.5 provides that if an employer engages in alcohol testing, the employer's policy must set a minimum level of acceptable alcohol concentration which will be said to violate the policy and that the standard may not be set below .040 expressed in terms of grams of alcohol per 210 liters per breath, or its equivalent. See section 730.5(9)e.

If the employer chooses to engage in alcohol testing using an alcohol screening device or a non-evidential breath testing device for the initial test, the employer must use an evidential breath testing device for a confirmatory test. The statute also provides that the policy must include requirements governing the evidential breath testing devices and the qualifications for personnel administering the initial confirmatory testing and that the requirements be consistent with those set forth in the statute.

The question before the administrative law judge in this case is not whether Brock Industrial Services, LLC had the right to discharge Mr. Duffy for these reasons but whether the discharge is disqualifying under the provisions of Iowa's drug testing act and the Employment Security Act.

While the decision to terminate Mr. Duffy may have been a sound decision from a management viewpoint, the evidence in the record does not establish that the company's drug and alcohol testing policy was in compliance with the requirements of Section 730.5, the authority under

which private sector employers doing business in Iowa may conduct drug or alcohol testing of employees. The results, therefore, cannot be used to disqualify the claimant for unemployment insurance benefits. Accordingly, it is held the claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

**DECISION:**

The representative's decision dated October 24, 2016, reference 01, is affirmed. The claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

pjs/pjs