

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LAWRENCE ROBINSON

Claimant

APPEAL NO. 09A-UI-03528-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MANPOWER INTERNATIONAL INC

Employer

**Original Claim: 01/25/09
Claimant: Respondent (1)**

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated February 23, 2009, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on March 31, 2009. The parties were properly notified about the hearing. The claimant participated in the hearing. Kerry Hale participated in the hearing on behalf of the employer. Exhibit One was admitted into evidence at the hearing.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked for the employer on an assignment at Winegard Inc, from February 27, 2008, to January 26, 2009. The claimant was informed and understood that under the employer's work rules, employees were required to submit to an alcohol test under certain circumstances, including when an employee is reasonably believed to be using a controlled substance, and were subject to termination if they tested positive for alcohol.

The written policy does not include the requirements governing evidential breath testing devices, alcohol screening devices, and the qualifications for personnel administering initial and confirmatory testing, consistent with regulations adopted as of January 1, 1999, by the United States Department of Transportation. The policy does not establish a standard for alcohol concentration that is deemed to violate the policy.

Pursuant to the policy, the claimant was required to submit to an alcohol test on January 26, 2009, after an employee and a supervisor smelled the odor of alcohol coming from the claimant. The supervisor had received training on recognizing the evidence of employee alcohol and drug abuse. She suspected that he had consumed alcohol before he reported to work.

A nurse was called in to conduct a breathalyzer test on the claimant. During the screening test, the result was .070 G/210L. A confirmatory test was taken after a 15-minute wait, which also was .070 G/210L.

The employer considered the test result to be positive and the claimant was discharged.

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.

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 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.

The employer's testing violated the drug and alcohol testing law because the written policy does not include the requirements governing evidential breath testing devices, alcohol screening devices, and the qualifications for personnel administering initial and confirmatory testing, which is required by Iowa Code § 730.5-7f(2). It also violates § 730.5-9e, because the written policy does not establish a standard for alcohol concentration that is deemed to violate the policy.

Because the testing violated the testing law, the claimant is not subject to disqualification under the unemployment insurance law.

DECISION:

The unemployment insurance decision dated February 23, 2009, reference 01, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/kjw