

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JAMES GORDON
Claimant

CROTHALL HEALTHCARE INC
Employer

APPEAL 19A-UI-05437-JC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/29/18
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 730.5 – Private Sector Drug-free Workplaces

STATEMENT OF THE CASE:

The claimant/appellant, James Gordon, filed an appeal from the June 28, 2019 (reference 03) Iowa Workforce Development (“IWD”) unemployment insurance decision which denied benefits based upon the claimant’s separation from employment. The parties were properly notified about the hearing. A telephone hearing was scheduled to be held on July 22, 2019 but was postponed to allow the claimant to retrieve proposed exhibits and for the employer’s witness to testify. The parties stipulated to the new date and time, and waived proper notice. A telephone hearing was conducted on July 30, 2019. The claimant participated personally. Serena Thompson, significant other/fiancé of the claimant, testified on his behalf. The employer, Crothall Healthcare Inc., participated through Alicia Zarate, operations manager.

Employer Exhibits 1-14 were admitted over objection. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as an Aide II Floor Technician and was separated from employment on June 3, 2019, when he was discharged. He last worked May 24, 2019 and was suspended pending investigation.

When the claimant was hired, he was provided training and access to the employer’s rules and procedures, which included an expectation that he would be free of alcohol and drugs while performing work. The policy also allows an employee to be tested for “reasonable suspicion” (Employer Exhibit 3). On May 23, 2019, the claimant stated he stayed up late watching boxing and drinking alcohol, including beer and Crown Royal whiskey.

He went to bed and in the morning, showered, ate two Hardees' breakfast sandwiches, some bacon and orange juice. He later ate a Big Mac and soda. He does not wear cologne because it irritates his skin. He arrived to work for his 4:00 p.m. shift on May 24, 2019. While at work, he was observed by Ms. Zarate and a second shift manager exhibiting signs of impairment. The claimant smelled of alcohol. He was unsteady on his feet, slurring words and crying uncontrollably in the environmental services office. He threw down his badge, he stated he hated the employer's place and would not calm down as requested. He was unable to dial the telephone when requested by the employer. Ms. Zarate requested security to help, and even security could not calm the claimant down, so local law enforcement had to be called.

The claimant worked on site for Genesis East hospital and was escorted to the alcohol technician, who administered a breathalyzer test (Employer Exhibit 8, 9). The claimant consented. He first blew a .161 BAC. The technician worked with the claimant to obtain a confirmatory result but determined the claimant was too impaired. A copy of the results were furnished to the claimant at the time. Ms. Thompson was called to come pick the claimant up. While suspended, the claimant spoke with Ms. Zarate and confirmed he had been drunk (Employer Exhibit 11).

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for disqualifying job related misconduct.

Iowa unemployment insurance law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Whether an employee violated an employer's policies is a different issue from whether the employee is disqualified for misconduct for purposes of unemployment insurance benefits. See *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000) ("Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." (Quoting *Reigelsberger*, 500 N.W.2d at 66.)). Testing under Iowa Code section 730.5(4) allows employers to test employees for drugs and/or alcohol but requires the employer "adhere to the requirements . . . concerning the conduct of such testing and the use and disposition of the results." Testing shall include confirmation of initial positive test results.

For breathalyzer testing, initial and confirmatory testing may be conducted pursuant to the employer's written policy. A policy shall include requirements governing breath testing devices, alcohol screening devices, and qualifications for administering personnel consistent with DOT rules. If an oral fluid sample is taken and results are received in the presence of the employee, this is considered a sufficient sample for split sample testing. Iowa Code § 730.5(7)f. Iowa Code section 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing. Iowa Code section 730.5(7)(i)(1) mandates that if a medical review officer (MRO) reports a positive test result to the employer, upon a confirmed positive drug or alcohol test by a certified laboratory, notify the employee of the test results by certified mail return receipt requested, and the right to obtain a confirmatory or split-sample test before taking disciplinary action against an employee. The Iowa Supreme Court has held that an employer may not "benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." *Eaton v. Iowa Emp't Appeal Bd.*, 602 N.W.2d 553, 557, 558 (Iowa 1999).

In this case, the claimant arrived to the workplace on May 24, 2019 exhibiting signs of impairment. This was witnessed and documented by multiple witnesses. The claimant was also yelling, crying and both security and law enforcement had to be called to deescalate the scene.

The employer has a written policy and tested the claimant on premises by way of alcohol breathalyzer. The claimant blew .161 BAC, which is approximately twice the legal limit in Iowa. The employer attempted to obtain a confirmatory test but the claimant was too impaired to comply, as documented by the technician. The employer cannot force an employee to submit to body fluids being retrieved and in this case, the claimant was intoxicated beyond a point that he would comply with a breathalyzer test. The claimant was given a copy of his test results as required. He admitted drinking alcohol the night before his shift and also admitted to Ms. Zarate that he was drunk at work, while on suspension.

Based on the evidence presented, the administrative law judge is persuaded that the employer was in substantial compliance of Iowa Code § 730.5 and the claimant admitted to being intoxicated in the workplace. Employees are required to be drug free in the workplace. The violation of the known work rule constitutes misconduct. Benefits are denied.

DECISION:

The unemployment insurance decision dated June 28, 2019, (reference 03) is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Jennifer L. Beckman
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Decision Dated and Mailed

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