

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

LONNIE A DANIELS
Claimant

CUSTOM-PAK INC – LP2
Employer

APPEAL NO. 14A-UI-11782-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/22/13
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated November 5, 2014, reference 01, that concluded he was discharged for work-connected misconduct. A telephone hearing was held on December 4, 2014. The parties were properly notified about the hearing. The claimant participated in the hearing. Andrea Lawrence participated in the hearing on behalf of the employer.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked full time for the employer as a shipping and receiving clerk from June 6, 1994, to July 15, 2014. He 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 have consumed alcohol and were subject to termination if they tested positive for alcohol, which is set at .04 grams per 210 liters of breath after being given the opportunity for alcohol rehabilitation.

Supervisors with the employer have received training on recognizing the signs of drug or alcohol use. The employer has an employee assistance program and provided employees (including the claimant) information about accessing the program. The employer has over 50 employees in Iowa.

The claimant received alcohol rehabilitation in June and July 2014 coordinated by the employer after speaking to human resources manager, Andrea Lawrence, about his alcohol abuse problems. He was informed that completing alcohol treatment was a condition of employment, he would be subject to periodical testing after his return to work, and he would be terminated if he tested positive for alcohol or drugs. He completed treatment and returned to work on July 7, 2014. The rehabilitation that claimant received was not the result of any positive test result for drugs or alcohol.

The claimant drank alcohol all night before reporting to work on the afternoon of July 15, 2014. He considered calling in sick but reported to work because he understood the employer was shorthanded. After reporting to work, he realized that he should not be at work and asked a supervisor if he could go home. The supervisor smelled alcohol on his breath, reasonably suspected he was under the influence of alcohol, and required him to submit to an alcohol test at a Medical Associates clinic. A breath sample was properly taken from the claimant and properly analyzed with a breathalyzer using an initial alcohol test and subsequent confirmatory test performed by a certified qualified breath alcohol technician. The analysis disclosed the presence of alcohol in the claimant's system at a level of 0.087 for the initial test and 0.191 for the confirmatory test 15 minutes later.

After receiving the result of the alcohol test, the employer informed the claimant verbally and in a certified letter July 21, 2014, that he was discharged for violating the employer's substance abuse policy due to the positive alcohol test. The employer did not offer the claimant rehabilitation even though this was his first positive drug or alcohol test because he had just returned from rehabilitation and was informed that a positive test result would result in termination.

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.

As an initial matter, I conclude the employer complied with the requirements of Iowa Code § 730.5 in requiring the claimant to submit to alcohol testing and the process for administering the test under Iowa Code § 730.5-f(2), which permits breath testing for alcohol testing.

But Iowa's drug and alcohol testing law in Iowa Code § 730.5-g, states:

- g. Upon receipt of a confirmed positive alcohol test which indicates an alcohol concentration greater than the concentration level established by the employer pursuant to this section, and if the employer has at least fifty employees, and if the employee has been employed by the employer for at least twelve of the preceding eighteen months, and if

rehabilitation is agreed upon by the employee, and if the employee has not previously violated the employer's substance abuse prevention policy **pursuant to this section**, the written policy **shall provide** for the rehabilitation of the employee.... (emphasis added).

Based on the evidence, the claimant tested positive for alcohol for the first time on July 15, 2014. I interpret the language of the statute, "the employee has not previously violated the employer's substance abuse policy **pursuant to this section**" as requiring a prior positive drug or alcohol test before disallowing rehabilitation since Iowa Code Section 730.5 involves the requirements for drug and alcohol testing. Since the claimant had not had a prior positive test for drugs or alcohol, the employer was required to provide him with the opportunity for rehabilitation before discharging him. The law does not state that a prior instance of undergoing alcohol treatment permits an employer to not offer rehabilitation for a first positive test result.

Since the employer failed to follow Iowa's drug and alcohol testing law in discharging the claimant, he is not disqualified from receiving unemployment insurance benefits under the rulings in the Eaton and Harrison cases. This is a difficult result because the claimant admitted that he had drunk alcohol before reporting to work. In the Eaton case, however, the Iowa Supreme Court focused on whether the drug test complied with the law and not whether the claimant had admitted to using drugs. This was because the reason for the discharge was the positive test result. Likewise, in this case, the claimant was discharged due to the positive test result not his admission. An administrative law judge is required to follow the law, including binding precedent in making decisions.

DECISION:

The unemployment insurance decision dated November 5, 2014, reference 01, 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

saw/pjs