

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**RICHARD L BARBER**  
Claimant

**APPEAL NO: 18A-UI-02733-TN**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**PINNACLE FOODS GROUP LLC**  
Employer

**OC: 02/04/18**  
**Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge/Misconduct  
Iowa Code §730.5 – Private Sector Drug Testing

**STATEMENT OF THE CASE:**

Richard Barber, the claimant, filed a timely appeal from a representatives unemployment insurance decision dated February 23, 2018, (reference 01) which denied unemployment insurance benefits, finding that the claimant was discharged from work on January 26, 2018, for violation of a known company rule. After due notice was provided an in-person hearing was held in Burlington, Iowa, on April 5, 2018. Claimant participated. Participating as a representative for the claimant was Mr. Robert Cale, Secretary of Human Local 617. Appearing as a witness for the claimant was Mr. Gunther Hendersen, Chief Steward. Employer participated by Ms. Cara Sanders, Human Resource Manager and Mr. Jeff Larson, Human Resource Generalist.

**ISSUE:**

Whether the claimant was discharged for work connected misconduct sufficient to warrant the denial of unemployment insurance benefits.

**FINDINGS OF FACT:**

The administrative law judge, having considered all of the evidence in the record, finds: Richard Barber was employed by Pinnacle Foods Group, LLC from June 1984 until February 6, 2018, when he was notified that he had been discharged from employment. Mr. Barber had been suspended by the company on January 26, 2018. Mr. Barber was employed as a full-time production technician/forklift driver and was paid by the hour.

On January 26, 2018, Mr. Barber was involved in a fork lift driving accident at the employer's facility while working that day. The forklift that Mr. Barber was operating struck a doorway causing substantial damage over \$1,000.00. The employer concluded that the claimant should be given post-accident drug screening under the terms of the company's written drug testing policy.

Mr. Barber was sent to a hospital facility during working hours where the claimant provided three samples of urine. The first two of the three samples were determined to be at an

unacceptable temperature. The claimant was not found to have engaged in a test refusal or tampering of the specimens, but had been required to provide additional specimens until a satisfactory specimen was obtained.

Mr. Barber was later informed by a telephone call from the testing facility that the test had been positive for marijuana metabolites. Ms. Sander, the company's human resource manager also informed the claimant the positive test results by personally speaking to him, informing him of the positive test result. Mr. Barber was later sent a letter informing him he was discharged from employment.

After the employer received the positive test results from the testing facility, company management met to determine what level of disciplinary action or termination should be applied in Mr. Barber's case. The company considered his length of service, the forklift accident and other factors. The company management determined the company would discharge Mr. Barber for violating the company drug policy. It appears that in a number of other cases the employer chose not to discharge the employees but to allow them to enter rehabilitation.

When Mr. Barber met with company management, the claimant was willing to enter rehabilitation and take an unpaid leave of absence from the company if necessary. The company nonetheless chose to discharge Mr. Barber. The claimant had also made an admission while he was requesting to enter rehabilitation and attempting to save his long-term job with the company.

Mr. Barber was aware that the company had a drug testing policy but was unfamiliar with the policy itself.

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

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

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 proof in this matter See Iowa Code § 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment 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. App. 1992).

Iowa Code Section 730.5 provides the authority under which private sector employer doing business in Iowa may conduct drug or alcohol testing of employees. In *Eatom v. Employment Appeal Board*, 602 N.W.2d 553 (Iowa 1999), the Supreme Court of Iowa considered the statute and held "an illegal test cannot provide the basis to render and employee ineligible for unemployment compensation benefits." Thereafter, *Harrison v. Employment Appeal Board*, 659 N.W.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 a basis for disqualifying the claimant for benefits.

In the present case, the employer had good cause for the post-accident testing of Mr. Barber because the damage in the forklift driving incident was well over \$1,000.00, but the employer's policy failed to comply with Iowa Code Section 730.5. In order to comply with Section 730.5, the employer must establish a detailed written drug testing policy prior to the testing and provide it to every employee subject to testing. The employer must provide supervisor's with a minimal amount of annual training, additional training thereafter.

The employer's written policy must provide a uniform requirement for disciplinary or rehabilitative actions that will be taken against employees who test positive for drugs or who refuse to provide a testing sample. An employer may not take any action against an employee that has not been stated in the written policy.

The following procedures must be followed when an employer's conducting private sector drug or alcohol testing in Iowa. The collection of the samples must be performed under sanitary conditions with regard to the privacy of the individual. The drug testing samples must be collected so that specimens are split into two components at the collection time. The samples must be stored by the testing laboratory for specified periods. Employees must be given an opportunity to provide any information that may be considered relevant to the test such as identification of prescription or over the counter medications that the employee may have used or other relevant medical information. The employer must provide employees with a list of the drugs to be tested. All confirmatory testing must be conducted at a laboratory certified by US Department Health and Human Services or approved by the rules adopted by the Department of Public Health. If a confirmed positive drug or alcohol test for a current employee is reported to the employer by the medical review officer, the employer must notify the employee in writing by certified mail return requested of the positive test results, the employee's right to request a

second confirmatory test, the fee payable to the employer for the cost of the confirmatory test and that in the event the confirmatory test is negative, that the employee will be reimbursed by the employer for the testing expense.

In the case at hand, the employer's policy does not meet the requirements of Iowa Code Section 730.5(9)(b), because the company's drug testing policy did not set forth the disciplinary action to be uniformly applied in the event of a positive drug test. Company's policy provided that management and human resources personnel decide what disciplinary action is to be taken. This is not of the uniform application of the rule contemplated in the statute. To comply with the law the drug or alcohol testing must be carried out within the terms of a written policy that "has been provided to every employee subject to testing and is available for review by employees". Iowa Code Section 730.5(9)(a)(1). In addition, the law requires an employer to notify the employee in writing by certified mail return receipt requested of the positive results of the test, the right to request and obtain a confirmatory test of the second sample collected at an approved laboratory of the employees choice and notified by the employer or reimbursement of expenses concerning the re-test if it is negative. Iowa Code Section 730.5-7-i.

The drug test done on Mr. Barber violates Iowa Code Section 730.5. Because the employer's policy violates Iowa law, the drug testing cannot be used to disqualify the claimant for administrative unemployment insurance benefits. The Supreme Court stated in the Eaton case, it would be contrary to Chapter 730 to allow an employer to benefit from an unauthorized drug test by using it as a basis to disqualify an employee for unemployment compensation benefits.

**DECISION:**

The representative's decision dated February 23, 2018, reference 01 is reversed. Claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, provided the claimant meets all the eligibility requirements of Iowa law.

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Terry P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

tn/scn