IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

EDWARD J OWENS
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL NO. 11A-UI-04976-W

ADMINISTRATIVE LAW JUDGE DECISION

OC: 3/6/11
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a fact-finding decision dated April 4, 2011, reference 02, which held claimant eligible for unemployment insurance benefits. After due notice, an in-person hearing was scheduled for and held on July 25, 2011. Claimant participated through counsel, Erin Dooley. Employer participated by David Duncan, Human Resources Manager. Claimant Exhibits 1-2; and Employer Exhibits A - I were admitted into evidence.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds as follows. Edward Owens was employed by Tyson Foods beginning on July 22, 2008. He was an hourly team member. He last worked for employer on February 28, 2011, when he was suspended without pay for a "post-accident" drug test. The employer presented no evidence about the "workplace accident." In fact, Mr. Owens did not have a workplace accident on February 28, 2011. On March 11, Mr. Duncan presented Mr. Owens with his options. Mr. Owens chose the "self-rehabilitation" option and asked to be re-tested immediately. An additional test was performed on March 11, 2011, which also was positive. Mr. Owens was continued on his suspension.

Following a confirmatory test, Mr. Owens was discharged on March 21, 2011 by employer because of the positive drug tests. Employer discharged on the second offense for positive drug tests. Claimant was not sent a notice by certified mail of the right to have a split sample tested at a lab of his choice.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

871 IAC 24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Iowa Code § 730.5(8) sets forth the circumstances under which an employer may test employees for the presence of drugs. In this case, the initial testing was done as a result of claimant being involved in an accident at work. Post-accident testing is allowable under Iowa Code § 730.5(8)(a)(3) (2011). "Employers may conduct drug or alcohol testing in investigating accidents in the workplace in which the accident resulted in an injury to a person for which injury, if suffered by an employee, a record or report could be required under chapter 88, …" Id. It is important to note that for this type of testing to be allowable, there must be a specific accident *and* the accident must be reportable under chapter 88. In Chapter 730.5, the term accident is not explicitly defined. The term accident is also not explicitly defined in Chapter 88. This is significant, and ultimately, the primary fighting issue in the case.

The claimant contends that he was not involved in an "accident." He contends that he had been receiving medical treatment for a work-related cumulative trauma injury to his elbow but denies that he had suffered any "accident." The employer presented no competent evidence of an accident. The employer's only witness was the H.R. Representative, Mr. Duncan. He testified that the box on the employer's form was checked that the test was performed as a "post-accident" test, but he had no further knowledge of the accident. (Emp. Ex. C).

In this case, the employer has not proven that it conducted the test in conjunction with the investigation of an accident which caused an injury. The employer apparently believes that the law allows it to conduct testing any time an employee has suffered an injury, whether that injury was the result of a workplace accident or the result of cumulative trauma in the ordinary course of the employee's work. This, however, is not the law. Section 730.5(8)(a)(3) clearly requires the following elements: (1) an accident, (2) which causes an injury and (3) an investigation of the *accident*.

In this case, the only evidence in the record is that Mr. Owens had been experiencing pain in his elbow as a result of his normal work activities. The only reason this is known is because Mr. Owens himself testified to it. The employer's H.R. Manager, Mr. Duncan, had no direct knowledge of any "accident." He had no knowledge of the injury either. He also had no knowledge of any investigation of an accident or injury. The only fact he knew first-hand is that someone had checked a box on the employer's form that the reason for the test was "Post Accident." (Emp. Ex. C). In this case, however, there was no accident. There was certainly no accident that the employer was investigating. In fact, there is no evidence in this record that the employer was investigating anything. The claimant suffered pain in his elbow as a result of his normal job duties. It appears the employer erroneously believed that it can test anyone who suffers and injury at work regardless of the nature of the accident. Consequently, the employer has not demonstrated that the test was conducted pursuant to Iowa Code § 730.5(8)(a)(3).

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 Employment Appeal Board*, 602 N.W.2d 553, 557-58 (Iowa 1999). Since the first test on February 28, 2011, was illegal, it is not necessary to consider whether there were other procedural failures, such as failing to notify the claimant of his rights by certified mail, or whether the second test was legal. The first test was invalid due to the failure to follow Iowa law and therefore all of the subsequent actions that occurred because of this test are invalid. The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated April 4, 2011, reference 02, is affirmed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

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Joseph L. Walsh
Administrative Law Judge

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Decision Dated and Mailed

jlw/pjs