

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JUSTIN B HOWARD

Claimant

APPEAL 17A-UI-13442-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SEABOARD TRIUMPH FOODS LLC

Employer

OC: 11/26/17

Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the December 19, 2017 (reference 05) unemployment insurance decision that disallowed benefits based upon claimant's separation from employment. The parties were properly notified of the hearing. A telephone hearing was held on January 23, 2018. The claimant, Justin B. Howard, participated personally. The employer, Seaboard Triumph Foods LLC, did not participate.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a maintenance supervisor. Claimant was employed from June 1, 2017 until sometime in September of 2017, when he was discharged. Claimant's immediate supervisor was Dewey Coy.

The employer does have a written drug policy but a copy was never given to the claimant. Claimant was never made aware that the policy existed while employed with this employer. The employer does not have an awareness program regarding the dangers of drug and alcohol use in the workplace. It is unknown if the employer requires supervisory personnel who are involved in alcohol or drug testing to attend a minimum of two hours of initial training and a minimum of one hour of subsequent training each year to inform them about the signs of drug and alcohol abuse.

In this case, the employer decided to test the claimant for drugs due to an alleged reasonable suspicion based upon claimant's behavior. No facts regarding claimant's behavior were given to claimant with regard to what formed the employer's suspicion. Claimant submitted to a urine analysis at a local clinic on September 1, 2017. Claimant was placed on suspension pending the outcome of the urine analysis.

The urine specimen collected was not split into two samples. Claimant was never given a written notice that he had the ability to have a second sample tested. Claimant was discharged for violation of the drug and alcohol policy when the urine analysis concluded that claimant had illegal drugs in his system.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

As a preliminary matter, I find that Claimant did not quit. Claimant was discharged from employment.

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.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or

disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(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.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).

What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

When an employee is discharged due to their failure to pass or refusal to submit to drug testing, the employer must comply with Iowa Code § 730.5. If an employer chooses to conduct alcohol or drug testing, it must substantially comply with all the strict requirements of this statute. If an employer has an alcohol or drug testing policy, it must be in writing. Iowa Code § 730.5(9)(a)(1). The policy must have been provided to every employee subject to testing and must be available for review by employees and prospective employees. Iowa Code § 730.5(9)(a)(1).

If the sample tested is urine, the employer must collect a split sample. Iowa Code § 730.5(7)b. If the employer is testing based upon reasonable suspicion, it must be able to articulate what facts led it to believe they had reasonable suspicion to test. Iowa Code § 730.5(8)c. Following the result of a positive urine test, an employee must be notified in writing by certified mail, return receipt requested, of the results and the employee's right to obtain a confirmatory test of the second sample. Iowa Code § 730.5(7)(1).

Employers shall establish an awareness program to inform employees of the dangers of drug and alcohol use in the workplace. An employer shall post notice of the employee assistance program in conspicuous places and explore alternative routine and reinforcing means of publicizing such services. In addition, the employer must provide the employee with notice of the policies and procedures regarding access to and utilization of the program. If an employer does not have an employee assistance program, the employer must maintain a resource file of alcohol or other drug abuse programs certified by the Iowa department of public health, mental health providers, or other persons, entities, or organizations available to assist employees with personal or behavioral problems. The employer shall provide all employees information about the existence of the resource file and a summary of the information contained within the resource file. Iowa Code § 730.5(9)(c). Further, in order to conduct drug or alcohol testing under this section, an employer shall require supervisory personnel of the employer involved with drug or alcohol testing under this section to attend a minimum of two hours of initial training

and to attend, on an annual basis thereafter, a minimum of one hour of subsequent training. Iowa Code § 730.5(9)(h).

The employer failed to present any testimony or other evidence with regard to its compliance with Iowa Code § 730.5. It is clear that the employer did not substantially comply with Iowa Code § 730.5. *Sims v. NCI Holding Corp.*, 759 N.W.2d 333 (Iowa 2009). “Substantial compliance is said to be compliance in respect to essential matters necessary to assure the reasonable objectives of the statute.” *Sims*, 759 N.W.2d at 338. Arguably, the most important aspect of the policy would be communication to the employee that it exists and what the policy in fact requires. Iowa Code § 730.5(9)(a)(1) provides that the policy *must* have been provided to every employee subject to testing *and* must be available for review by employees and prospective employees. (emphasis added). Claimant credibly testified that he was never made aware that the policy existed. This is not substantial compliance with the statute.

In *Eaton v. Employment Appeal Bd.*, the Iowa Supreme Court found, “[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.” 602 N.W.2d 553, 558 (Iowa 1999). The employer’s failure to comply with Iowa Code § 730.5 means that the evidence from the drug test results; in this case, the positive result, is excluded from evidence. Because that evidence is excluded, there is no current act of job-related misconduct that claimant was discharged for. *Harrison v. Employment Appeal Bd.*, 659 N.W.2d 581, 586 (Iowa 2003)(illegal test bars the use of “test results to prove misconduct.”). As such, benefits are allowed, and the employer’s account may be subject to charges.

DECISION:

The December 19, 2017 (reference 05) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The employer’s account may be subject to charges.

Dawn R. Boucher
Administrative Law Judge

Decision Dated and Mailed

db/rvs