

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANTHONY J GARBER
Claimant

APPEAL NO. 09A-UI-00226-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PINNACLE FOODS GROUP LLC
Employer

**OC: 11/09/08 R: 04
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

Pinnacle Foods Group LLC filed an appeal from a decision of a representative dated January 2, 2009, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on January 21, 2009. Mr. Garber participated personally. The employer participated by Wilda Lampe and Joseph Morgan. Exhibits One through Four were received into evidence.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct in connection with his work.

FINDINGS OF FACT:

The administrative law judge having heard the testimony and considered all of the evidence in the record, finds: The claimant worked for this employer from July 2, 2007 until November 10, 2008 when he was discharged from employment. Mr. Garber was employed as a full-time production worker and was paid by the hour.

The incident that prompted Mr. Garber's discharge from employment took place on November 5, 2008. At that time Mr. Morgan, a team manager, observed the claimant walking in a hallway near a management restroom. Upon entering the restroom Mr. Morgan smelled what he believed to be marijuana smoke. Mr. Morgan reported the matter to Mr. Garber's supervisor and approximately two hours later the claimant was called to a meeting with company management and a union representative. Based upon Mr. Morgan's report of what he believed to be the smell of marijuana smoke, the employer believed that they had established cause to require that Mr. Garber be drug tested. After considering the matter and conferring with his union representative, Mr. Garber declined to be tested fearing that second-hand smoke that he may have ingested inadvertently from being in the proximity of others in a social setting, may have resulted in a positive test for the claimant.

Under company policy employees who refuse to be drug tested based on reasonable suspicion are subject to discharge. The claimant was initially suspended, the matter was reviewed and a decision was made to terminate Mr. Garber from his employment with Pinnacle Foods Group LLC on November 10, 2008.

The employer has a written substance abuse policy set forth in its policy manual and Mr. Garber had received a copy of the manual (See Exhibit Three).

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Garber was discharged for misconduct in connection with the employment. It does not.

The employer has the burden of proof in this matter. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance 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 1992).

Iowa Code section 730.5 provides the authority under which a private sector employer doing business in Iowa may conduct drug or alcohol testing of employees. In Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553 (Iowa 1999) the Supreme Court of Iowa considered the statute and held “that an illegal drug test cannot provide the basis to render an employee ineligible for unemployment compensation benefits.” Thereafter, in 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 requirement for the drug test the test could not serve as a basis for disqualifying the claimant for benefits. In the present case the employer believed that it had reasonable suspicion to request drug testing, but the employer’s policy, with respect to training given to supervisory personnel involved in drug testing and the recognition of evidence of suspected drug abuse failed to comply with Iowa Code section 730.5. Accordingly, the policy was not authorized by law and cannot serve as a basis for disqualifying Mr. Garber from unemployment insurance benefits.

Iowa Code section 730.5(1)(h) defines “reasonable suspicion” that would justify a drug test and states in relevant part as follows:

h. “Reasonable suspicion drug or alcohol testing” means drug or alcohol testing based upon evidence that an employee is using or has used alcohol or other drugs in violation of the employer’s written policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. For purposes of this paragraph, facts and inferences may be based upon but not limited to any of the following:

- (1) Observable phenomena while at work such as direct observation of alcohol or drug use or abuse or the physical symptoms of manifestations of being impaired due to alcohol or other drug use.
- (2) Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance.

- (3) A report of alcohol or other drug use provided by a reliable and credible source.

The employer's request for drug testing was based upon an observation by an untrained team manager of what he believed to be the smell of marijuana smoke in an unoccupied bathroom in an area where Mr. Garber, or any other individual, might may have been present. Mr. Morgan did not observe drug use or observe any physical symptoms or manifestations of being impaired due to drug use on the part of Mr. Garber. Mr. Morgan did not observe any abnormal conduct or erratic behavior while at work or any deterioration in the claimant's work performance. No reliable or credible source provided a report of drug or alcohol use by Mr. Garber.

The administrative law judge, therefore concludes that it is questionable whether reasonable suspicion that Mr. Garber violated the company's drug policy was established either independently, or based upon the requirements of Iowa Code section 730.5(1)(h).

However the presence or the lack thereof, of reasonable suspicion is only one factor to be considered. Other requirements set forth in Iowa Code section 730.5 must also be considered before Mr. Garber's discharge from employment can serve as a basis for disqualifying Mr. Garber from unemployment insurance benefits.

Iowa Code section 730.5(9)h provides as follows:

h. 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. The training shall include, but is not limited to, information concerning the recognition of evidence of employee alcohol or other drug abuse, the documentation and cooperation of employee alcohol and other drug abuse, and a referral of employees who abuse alcohol or other drugs to the Employee Assistance Program or to the resource file maintained by the employer pursuant to paragraph "c", subparagraph (2).

The evidence in the record does not establish that the employer's drug and alcohol policy complies with the Code standard. When questioned Mr. Morgan testified that he had received no special training on the recognition of drug abuse but instead only relied on his personal experience in the past where he may have been present where marijuana was smoked.

Because the employer's drug and alcohol testing policy did not comply with Iowa Code section 730.5, it was not authorized by law and the claimant's refusal to be tested under its provisions cannot serve as a basis for disqualifying Mr. Garber from unemployment insurance benefits.

Based upon the evidence in the record and the application of the appropriate law, the administrative law judge concludes that Mr. Garber was discharged for no disqualifying reason. Accordingly, Mr. Garber is eligible for benefits providing that he meets all other eligibility requirements of Iowa law.

DECISION:

The Agency representative's decision dated January 2, 2009, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, providing that he meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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