

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CHRISTINA ZINK**  
Claimant

**APPEAL NO: 14R-UI-06464-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DES MOINES IND COMMUNITY SCH DIST**  
Employer

**OC: 04/06/14**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge/Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the April 28, 2014, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on July 16, 2014. The claimant participated in the hearing. Marci Cordero, Supervisor of Health Services; Anthony Spurgetis, Human Resources Generalist; Rhonda Wagner, Benefits Specialist; and Kathy McKay, Executive Director of Risk Management participated in the hearing on behalf of the employer. Employer's Exhibits One through Four were admitted into evidence.

**ISSUE:**

The issue is whether the employer discharged the claimant for work-connected misconduct.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time special education associate for Des Moines Independent Community School District from September 5, 2000 to April 9, 2014. She was discharged for being under the influence of alcohol at work.

On April 8, 2014, the claimant's co-worker, Mr. Craft, notified Principal Kevin Biggs he detected the odor of alcohol on her when she arrived at work that morning. Ms. Biggs called the claimant into his office and informed her there was a suspicion she might be under the influence of alcohol and asked her if she had consumed any alcohol that morning. The claimant stated she had not and Mr. Biggs asked when she last drank alcohol. The claimant told him she had two to three beers the previous evening, stopping around 11:00 p.m. She also indicated she was going through a divorce and was experiencing a great deal of stress and the alcohol helped her alleviate some of that stress.

Mr. Biggs then called Director of High Schools Alisa Farmer and told her about the situation and asked her how he should proceed. It was determined Mr. Biggs should contact health services and ask the claimant to submit to blood alcohol testing. He returned to his office and told the claimant he had reasonable suspicion to require the claimant to submit to a test for alcohol

under the employer's drug and alcohol policy. He informed her she would be transported to a district approved testing facility for an assessment as was standard procedure. The claimant indicated she understood and stated she did not mind being tested. The evidence does not establish that either Mr. Craft or Mr. Biggs have received at least a minimum of two hours of initial training or attended, on an annual basis thereafter, a minimum of one hour of subsequent training, in reasonable suspicion observation.

The claimant was escorted to Penn Avenue Medical Center by Marci Cordero, Supervisor of Health Services, where breath alcohol and urinalysis tests were conducted by a technician of unknown qualifications. The claimant's Breathalyzer results showed .042 at 9:37 a.m. and .035 at 9:54 a.m. The claimant and the employer were notified of the test results. The employer's threshold limit number is .02 or greater. Ms. Cordero notified Mr. Biggs and Human Resources and transported the claimant back to the school.

On April 9, 2014, Anthony Spurgetis, Human Resources Generalist, met with the claimant and a union representative and presented the claimant with the test results and allowed her to provide her side of facts regarding the situation. As it was apparent the claimant's employment was going to be terminated, the claimant's union representative asked Mr. Spurgetis if the claimant could resign rather than face certain termination, and she was allowed to do so.

The employer has a written alcohol and other drug policy but it does not provide for rehabilitation for first time alcohol offenses.

#### **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.

Iowa Code section 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).

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a; 871 IAC 24.32(1)a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982).

The reason cited by the employer for discharging the claimant is violation of the employer's drug and alcohol policy through a positive alcohol test. In order for a violation of an employer's drug or alcohol policy by a positive drug or alcohol test to be disqualifying misconduct, it must be based on a test performed in compliance with Iowa's drug and alcohol testing laws. *Harrison v. Employment Appeal Board*, 659 N.W.2d 581 (Iowa 2003); *Eaton v. Iowa Employment Appeal Board*, 602 N.W.2d 553, 558 (Iowa 1999). The *Eaton* court said, "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.

One of the authorized circumstances under which an employer may require an employee to submit to testing is where there is "reasonable suspicion" an employee has consumed alcohol in violation of the employer's policies. Iowa Code section 730.5(8)(c). However, "If the written policy provides for alcohol testing, the employer shall establish in the written policy a standard for alcohol concentration which shall be deemed to violate the policy." Iowa Code section 730.5(9)(e). Further, "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...the written policy shall provide for the rehabilitation of the employee..." Iowa Code section 730.5(9)(g). Finally, "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 and other drug abuse, the documentation and corroboration of employee alcohol and other drug abuse, and the referral of employees who abuse alcohol or other drugs to the employee assistance program or to the resource file maintained by the employer..." Iowa Code section 730.5(9)(h).

In this case, the employer's instincts may have been correct in deducing that the claimant may have been under the influence of alcohol, but in making the discharge decision, the employer chose to rely on the results of the alcohol testing, rather than on making further specific observations to support a "lay" conclusion that the claimant was under the influence. Benavides v. J.C.Penney Life Ins. Co., 539 N.W.2d 352 (Iowa 1995). Since the employer chose to rely on the alcohol testing results, it is compelled to comply with the provisions of Iowa law in order to discharge an employee based on those results. As noted above, the employer has failed to satisfy several key statutory requirements in order to rely on an alcohol test result to make a discharge; the employer has not substantially complied with the drug and alcohol testing provisions. Therefore, the employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:**

The April 28, 2014, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

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