BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

KEVIN M ANDERSEN SR	:	
	:	**HEARING NUMBER:** 10B-UI-04869
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
BE & K CONSTRUCTION COMPANY	:	
Employer.		

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The administrative law judge's Findings of Fact are adopted by the Board as its own.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2009) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
>
> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

The Iowa Supreme Court has ruled that an employer cannot establish disqualifying misconduct based solely on a drug or alcohol test performed in violation of Iowa's drug testing laws. *Harrison v. Employment Appeal Board*, 659 N.W.2d 581 (Iowa 2003); *Eaton v. Employment Appeal Board*, 602 N.W.2d 553, 558 (Iowa 1999). The Court in *Eaton* stated, "[i]t 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. Thus we must examine Iowa's drug testing statute to see if the Employer has complied with its requirements.

The Board is cognizant of the fact that the Board has twice before authorized deviation from the literal terms of Iowa Code §730.5 and on both occasions been reversed. Yet it is also true that the Iowa Supreme Court has now ruled that substantial compliance with Iowa Code §730.5 is sufficient. *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 v. NCI Holding Corp.*, 759 N.W.2d 333, 338 (Iowa 2009)(quoting *Superior/Ideal, Inc. v. Bd. of Review*, 419 N.W.2d 405, 407 (Iowa 1988)). *Sims* ruled that substantial compliance is sufficient to satisfy the notice provision of Iowa Code §730.5(7)(i). We assume, without deciding, that substantial compliance with all provisions of §730.5 is all that is required. Still we are convinced that even under this standard the Employer has not complied with the requirements of the Code.

Iowa Code 703.5(9) governs the Employer's policies and states:

> 9. Written policy and other testing requirements.
>
> a. (1) Drug or alcohol testing or retesting by an employer **shall** be carried out **within the terms of a written policy** which has been provided to every employee subject to testing, and is available for review by employees and prospective employees. If an employee or prospective employee is a minor, the employer shall provide a copy of the written policy to a parent of the employee or prospective employee and shall obtain a receipt or acknowledgment from the parent that a copy of the policy has been received. Providing a copy of the written policy to a parent of a minor by certified mail, return receipt requested, shall satisfy the requirements of this subparagraph.
>
> b. … The written policy **shall** also **provide** that **if rehabilitation is required** pursuant to paragraph "g", the employer **shall not take adverse employment action** against the employee so long as the employee complies with the requirements of rehabilitation and successfully completes rehabilitation. …

> …
> g. 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, and if the employer has at least fifty employees, and if the employee has been employed by the employer for at least twelve of the preceding eighteen months, and if rehabilitation is agreed upon by the employee, and if the employee has not previously violated the employer's substance abuse prevention policy pursuant to this section, **the written policy shall provide for the rehabilitation of the employee** pursuant to subsection 10, paragraph "a", subparagraph (1), and the apportionment of the costs of rehabilitation as provided by this paragraph.
> …
> Rehabilitation required pursuant to this paragraph shall not preclude an employer from taking any adverse employment action against the employee **during the rehabilitation** based on the employee's failure to comply with any requirements **of the rehabilitation**, including any action by the employee to invalidate a test sample provided by the employee pursuant to the rehabilitation.

An adequate policy, and distribution of it, is a requisite to compliance with Iowa Code §730.5. *See McVey v. National Organization Service*, Inc., 719 N.W.2d 801, 803 (Iowa 2006)("requirement that the employer adopt an employee drug-testing policy and deliver it to each employee is a necessary step in invoking the statutory authorization for such testing.").

As pointed out by the Administrative Law Judge 730.5(10) authorizes employment action under specified conditions:

> 10. Disciplinary procedures.
>
> a. Upon receipt of a confirmed positive test result for drugs or alcohol which indicates a violation of the employer's written policy, or upon the refusal of an employee or prospective employee to provide a testing sample, an employer may use that test result or test refusal as a valid basis for disciplinary **or** rehabilitative actions **pursuant to the requirements of the employer's written policy** and the requirements of this section, which may include, among other actions, the following:
> …
> (3) Termination of employment.

So putting this together the conditions governing when may an employee be fired pursuant to Iowa Code §730.5(10) are: (1) confirmed test result or refusal to take, and (2) result indicating a violating of written policy, and (3) termination is pursuant to the requirements of the written policy.

Recognizing these criteria, we do not see the confusion identified by the Administrative Law Judge. The Code only authorizes termination pursuant to written policy. The Code requires the Employer to have a written policy if the Employer wants to terminate. And the Code specifies that if rehabilitation is required "the employer shall not take adverse employment action against the employee so long as the employee complies with the requirements of rehabilitation and successfully completes rehabilitation." Iowa Code §703.5(9). It in inescapable that if an employee must be offered rehabilitation under 730.5(9)(g) then any termination of that employee before treatment would not be "pursuant to the requirements of" an employer policy that complies with the specific mandate of §703.5(9)(b). This is the literal meaning of the Code sections in question. We note that Iowa Code §730.5 is over 6,000 words long, and that the Administrative Law Judges at Workforce are experts in Chapter 96. It is perfectly understandable, then, that the Administrative Law Judge has apparently simply overlooked Iowa Code §730.5(9)(b). Once that provision is given its due, we think no other result can follow.

Not only have we engaged in a literal reading of the statute, but it is the only one that makes sense of all the Code sections at issue. It would not make any sense to require the Employer to have a policy that prohibits termination if rehabilitation is required, but allow the Employer to violate the *mandated* policy. Nor does it seem to serve the obvious policy of providing an incentive for rehabilitation to allow termination *before* rehabilitation. We recognize, of course, that failure to complete the rehabilitation, use of intoxicants while in rehabilitation, etc. will authorize termination once rehabilitation is commenced under Iowa Code §730.5(9)(g). But this paragraph clearly only applies "during" rehabilitation. Indeed, such a provision would be unnecessary if termination were allowed in any event.

Turning to the case before us, the Employer has a policy of immediate termination prior to rehabilitation is directly contrary to Iowa Code §730.5(9)(b). If the employee is required to be offered rehabilitation then the employee may not be fired over the test result (unless of course he engaged in the conduct outlined in §730.5(9)(g)).

So this case boils down to whether the Employer was required to offer the Claimant rehabilitation under Iowa Code §730.5(9)(g). The requirements of that paragraph are: (1) confirmed positive alcohol test which indicates an alcohol concentration greater than the concentration level established by the employer pursuant to law, and (2) the employer has at least fifty employees, and (3) the employee has been employed by the employer for at least twelve of the preceding eighteen months, and (4) rehabilitation is agreed upon by the employee, and (5) the employee has not previously violated the employer's substance abuse prevention policy.

The requirement of a confirmed alcohol test result is satisfied (and if it weren't the Employer would have no basis for termination). We note the section only requires rehabilitation for alcohol results, and this is such a case.

We have found, by adopting the Administrative Law Judge's findings, that the Employer had 156 employees during the relevant period. The requirement of fifty employees is satisfied.

We have found, by adopting the Administrative Law Judge's findings, that the Claimant has been continuously employed by the Employer for over 44 consecutive months. The 12 of 18 month employment requirement is satisfied.

The Claimant did agree to participate in the program. We are not sure if the Claimant had refused what this would have meant. It is one thing to turn down rehabilitation once you are fired, and another to turn it down when offered as a condition of staying employed. Moreover, it is entirely possible that even having an inadequate policy would mean that the test administration itself (rather than the termination) was unauthorized. When a test is unauthorized we exclude the results from evidence, and this often means misconduct cannot be proven. We duck these issues in this case, since the Claimant did agree to rehabilitation. This being the case the requirement that the employee agree to rehabilitation has been satisfied.

Finally, we have found, by adopting the Administrative Law Judge's findings, that the Claimant had never tested positive for alcohol prior to this. As far as the record shows, the Claimant had not previously violated the Employer's substance abuse policy, so the fifth and final requirement is satisfied.

Since the five criteria apply to this Claimant the Employer was required under Iowa Code §730.5 to offer the Claimant rehabilitation, and not to terminate the Claimant "so long as the [Claimant] complies with the requirements of rehabilitation and successfully completes rehabilitation." Iowa Code §730.5(9)(b). Since the Employer did fire the Claimant, but not based on any failure to comply with the requirements of rehabilitation, we are forced to conclude that the termination was contrary to Iowa Code §730.5. This being the case *Eaton* and *Harrison* require us to allow benefits.

We understand the Administrative Law Judge's point that awards of benefits should not depend on the size of the Employer. We are inclined to agree, but we don't write the laws either. Without a doubt, the termination was not authorized by Iowa Code §730.5 (even assuming that the *test* was). The Iowa Supreme Court has tied awards of benefits to a termination that is valid under Iowa Code §730.5. Whether or not this was a good idea, it is the law of the land and we follow it, as we must. Benefits are allowed.

DECISION:

The administrative law judge's decision dated June 4, 2010 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for no disqualifying reason. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

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John A. Peno

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Monique F. Kuester

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Elizabeth L. Seiser

RRA/fnv