

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

JUSTIN M PHILLIPS
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FARMINGTON IA 52626

ALANIZ LLC
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MT PLEASANT IA 52641-7299

Appeal Number: 04A-UI-05119-DWT
OC 05/04/03 R 04
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal are based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Alaniz LLC (employer) appealed a representative's April 30, 2004 decision (reference 01) that concluded Justin M. Phillips (claimant) was qualified to receive unemployment insurance benefits, and the employer's account was subject to charge because the claimant had been discharged for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known address of record, a telephone hearing was held on May 27, 2004. The claimant participated in the hearing. Jackie Zoupas, the director of operations, and Vicky Rhoads appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on November 16, 2001. He worked full time on second shift as a laser coordinator. The employer's written drug policy informs employees they will be discharged if they have a positive drug test.

On April 7, 2004, employees reported that the claimant came back from breaks with an aroma about his person and that his eyes appeared bloodshot. On April 8, the employer asked another supervisor, J.B., to watch the claimant when he went on a break. J.B. observed the claimant move his car from one area of the parking lot to another and saw lighters flickering in his car. When the claimant went back to work, J.B. went to the claimant's car and detected an aroma coming from the vehicle. J.B. concluded the claimant's demeanor was different when he returned from his break and noticed the claimant pulled his baseball cap low on his face so J.B. could not see his eyes. During his break on April 8, the claimant ate a pizza in his car and smoked cigarettes.

J.B. did not work on Friday, April 9. He reported his April 8 observations to the employer on April 12. When the claimant reported to work on Tuesday, April 13, the employer asked the claimant to take a drug test. The employer took him to an alcohol and drug dependency office, where the test was performed. No one asked the claimant what if any medication he took.

The facts do not indicate a medical review officer reviewed the test results or had any contact with the claimant. The employer received notice of the results of the test on April 16. Rhoads told the claimant his test result was positive for a controlled substance. The employer did not offer the claimant an opportunity to have the split sample tested. The employer discharged the claimant on April 16, 2004 for violating the employer's drug policy. The claimant had used drugs the weekend of April 10 when he was not at work.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges her for reasons constituting work-connected misconduct. Iowa Code §96.5-2-a. The Iowa Supreme Court has ruled that an employer cannot establish disqualifying misconduct based on a drug 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, "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.

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 willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

Under Iowa Code §730.5(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 of the physical symptoms or 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.
- (4) Evidence that an individual has tampered with any drug or alcohol test during the individual's employment with the current employer.
- (5) Evidence that an employee has caused an accident while at work which 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, or resulted in damage to property, including to equipment, in an amount reasonably estimated at the time of the accident to exceed one thousand dollars.
- (6) Evidence that an employee has manufactured, sold, distributed, solicited, possessed, used, or transferred drugs while working or while on the employer's premises or while operating the employer's vehicle, machinery, or equipment.

The employer asserted there was reasonable suspicion to ask the claimant to take a drug test on April 13. Under Iowa Code §730.5(h) it is questionable as to whether the employer established reasonable suspicion to request a drug test. The employer also failed to give the claimant an opportunity to have a split sample tested by another laboratory, Iowa Code §730.5(i), and there is no evidence a medical review officer reviewed any information. Iowa Code §730.5(g). The employer did not meet the requirements of Iowa's drug testing law. Therefore, the claimant cannot be disqualified from receiving unemployment insurance benefits. As of April 18 2004, the claimant is qualified to receive unemployment insurance benefits.

DECISION:

The representative's April 30, 2004 decision (reference 01) is affirmed. The employer discharged the claimant for reasons that do not constitute work-connected misconduct. As of April 18, 2004, the claimant is qualified to receive unemployment insurance benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

dlw/b