

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSEPH L SHEPPARD
Claimant

APPEAL NO: 14A-UI-01461-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 01/12/14

Claimant: Appellant (2)

Section 96.5-2-a – Discharge
Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Joseph L. Sheppard (claimant) appealed a representative's January 31, 2014 decision (reference 02) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Tyson Fresh Meats, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 3, 2014. The claimant participated in the hearing. Jamal Grcic 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.

ISSUES:

Was the claimant discharged for work-connected misconduct? Is the claimant eligible for unemployment insurance benefits by being able and available for work?

FINDINGS OF FACT:

The claimant started working for the employer on July 18, 2006. He worked full time as a second shift production worker at the employer's Waterloo, Iowa pork processing facility. His last day of work was January 6, 2014. The employer discharged him on January 9, 2014. The reason asserted for the discharge was violation of the employer's drug and alcohol policy through a positive alcohol test.

The employer asserted through second-hand testimony that when the claimant reported for his shift prior to 4:00 p.m. on January 6 he was observed as not being able to walk straight or stand still. As a result, the employer determined it had reasonable suspicion to order the claimant to report for a drug and alcohol test. The claimant acknowledged that he had consumed one beer about an hour before reporting for work, but denied other alcohol consumption, although he acknowledged that he was on other prescription medication including hydrocodone which could have affected his appearance.

The claimant was taken to a facility and was required to submit to a breathalyzer alcohol test as well as a urinalysis drug test. There was no issue with regard to the urinalysis drug test, but the employer asserted that the breathalyzer alcohol test had been positive. The employer provided conflicting information as to whether there was one breathalyzer test or two, and conflicting information as to what time or times the test had been done, and what results had been given. The claimant testified that there was only one breathalyzer test done. The employer did not establish that the breathalyzer test was performed by a certified technician. Because of the understanding that the claimant had a positive alcohol test, and because the claimant had already had a positive alcohol test and had been allowed to pursue “self-rehabilitation” in August of 2012, the employer discharged the claimant.

The claimant is currently in remission from stage four cancer. While he remains under a doctor’s care, he does not currently have any medical restrictions precluding him from working, and he has been performing a search for work.

REASONING AND CONCLUSIONS OF LAW:

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 § 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. At least in part due to the strong Fourth Amendment and other privacy concerns involved in requiring a test of an employee’s body, 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.

Iowa Code § 730.5(7)(f)(2) provides an exception to the regular statutory requirement of split sample testing in the case of alcohol testing, provided that “[t]he [employer’s] written policy shall include requirements governing evidential breath testing devices, alcohol screening devices, and the qualifications for personnel administering initial and confirmatory testing, which shall be consistent with regulations adopted as of January 1, 1999, by the United States department of transportation governing alcohol testing required to be conducted pursuant to the federal Omnibus Transportation Employee Testing Act of 1991.” In this case, the employer has not established that the technician who performed the test was in fact certified under those provisions as required, and has not established that there was in fact a confirmation testing

conducted in compliance with 49 CFR 40.251. That regulation specifies that there be a waiting period between an initial positive test and a second confirmatory test of "at least 15 minutes." The employer has not demonstrated that it substantially complied with the drug testing regulations. As a result, the employer cannot rely on the reportedly positive alcohol test to establish disqualifying misconduct. Based upon the evidence provided, the claimant is not disqualified from benefits.

The remaining question is whether the claimant is and was able and available for work after the separation. With respect to any week in which unemployment insurance benefits are sought, in order to be eligible the claimant must be able to work, be available for work, and be earnestly and actively seeking work. Iowa Code § 96.4-3. To be found able to work, "[a]n individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); 871 IAC 24.22(1).

The claimant has demonstrated that he is able to work in some gainful employment. Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The representative's January 31, 2014 decision (reference 02) is reversed. The employer did discharge the claimant but not for disqualifying reasons. He is currently able and available for work. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs