

FINDINGS OF FACT:

The claimant worked for the employer from April 4, 2005, to July 29, 2005. Under the employer's work rules, employees were required to submit to a drug test under certain circumstances, including when an employee is involved in a work-related accident, and were subject to termination if they tested positive for drugs. The claimant never received a copy of the employer's written policy.

Pursuant to the policy, the claimant was required to submit to a drug test on July 29, 2005, after he suffered an accident at work. A urine sample was properly taken from the claimant and properly analyzed using an initial drug screen test and subsequent confirmatory test by a certified laboratory. The analysis disclosed the presence of marijuana in the claimant's system at a level which would demonstrate the claimant had used marijuana in violation of the employer's policy. The employer discharged the claimant on August 1, 2005, after it received the results of the drug test. The claimant was personally given a letter terminating his employment and informing him of his right to have a split sample of his urine tested at his own expense.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

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.

871 IAC 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 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 N.W.2d 661, 665 (Iowa 2000).

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). As 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 also has the burden of proving that the requirements of Iowa Code § 730.5 have been met. Iowa Code § 730.5-15-b. One question left unanswered by the Eaton and Harrison cases is whether strict or substantial compliance with the statute is required before a claimant is disqualified from unemployment insurance benefits. In my judgment, substantial compliance is the rational standard to apply. "Substantial compliance is said to be compliance in respect to the essential matters necessary to assure the reasonable objectives of the statute." Superior/Ideal Inc. v. Board of Review, 419 N.W.2d 405, 419 (Iowa 1988).

For example, one requirement of the statute is for employers to notify employees by certified mail, return receipt requested, of the test results and their right to have an independent test performed on the second sample at an approved laboratory. Iowa Code § 730.5-7-i(1). In this case, the employer notified the claimant by letter delivered personally of the results of the test and the right to have an independent test conducted on the split sample. The employer technically violated the statute since it did not send the notice by certified mail. The claimant, however, acknowledged receiving the letter. Therefore, the objective of the statute, which is to make sure an employee is fully advised of the right to have an independent test performed, was unaffected. The objective of requiring certified mail, return receipt requested, is to give the employer the means to prove that the letter was sent and received. The employer, therefore, substantially complied with the law regarding notice of the test results.

On the other hand, the following essential legal requirements of Iowa Code § 730.5 have not been met. There is no evidence that the claimant was given a copy of the employer's drugs testing policy as required by § 730.5-9-a(1). The employer did not provide the claimant with a list of the drugs for which he would be tested as required by Iowa Code section 730.5-7-c(2). All of these are essential requirements because they protect employees from having an

adverse employment action taken against them based on false positive test results or without being fully aware of the employer's drug and alcohol testing program. The evidence, therefore, fails to establish substantial compliance with Iowa Code section 730.5.

Finally, the claimant admitted using marijuana before the test was performed. In the Eaton case, however, the Iowa Supreme Court focused on whether the drug test complied with the law and not whether the claimant had admitted to using drugs. This was because the reason for the discharge was the positive test result. Likewise, in this case, the claimant was discharged due to the positive test result. Therefore, the claimant is not subject to disqualification because the testing procedures used by the employer did not substantially comply with state law.

DECISION:

The unemployment insurance decision dated August 30, 2005, reference 05, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

saw/pjs