

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOHN A BORSCH
Claimant

SWIFT PORK COMPANY
Employer

APPEAL 21A-UI-02464-DZ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/28/20
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quit
Iowa Code § 730.5 – Private Sector Drug-free Workplaces

STATEMENT OF THE CASE:

John A Borsch, the claimant/appellant, filed an appeal from the December 22, 2020, (reference 02) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was held on March 5, 2021. Mr. Borsch participated and testified. The employer registered for the hearing but was not available at the phone number it provided at the scheduled day and time of the hearing.

ISSUE:

Was Mr. Borsch discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Borsch began working for the employer in January 2015. He had previously worked for the employer and took a year off to care for a family member. He worked as a full-time maintenance technician. His last day at work was September 27, 2020 and his employment was terminated on October 2, 2020.

Mr. Borsch was scheduled to work at 2:45 p.m. on September 27. Mr. Borsch and one of his co-workers were the only two people who knew how to fix certain machines. The other person was scheduled to start vacation September 28. The morning of September 27, Dale Cobb, a supervisor called Mr. Borsch and asked to him to come to work at about 8:30 a.m. The employer had also called the other person to come to work. The employer wanted Mr. Borsch and the other person to work early on September 27 to make sure the machines were fixed before the other person started vacation. The employer would often call Mr. Borsch and ask him to come to work early or stay at work late. Mr. Borsch felt pressured to say yes so he told Mr. Cobb okay and came to work. The day before Mr. Borsch was off of work for the first time in about a month and he drank alcohol with friends.

While he was at work, the employer brought Mr. Borsch into the office. The employer told Mr. Borsch that they suspected that he was under the influence of alcohol. An on-staff nurse administered a breathalyzer test. Mr. Borsch was above the limit written in Iowa law. The employer suspended Mr. Borsch and told him that they would contact him when they received the results. After not hearing from the employer for a week, Mr. Borsch contacted the employer on October 2. The employer informed Mr. Borsch that his employment was terminated for violating its drug free workplace policy.

Mr. Borsch did not receive the test results via certified mail. Mr. Borsch testified that the employer had given other employees who had failed the alcohol test the option to go to treatment. The employer did not give Mr. Borsch that option.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes Mr. Borsch 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.

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).

871 IAC 24.32(4) provides:

Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

Testing under Iowa Code section 730.5(4) allows employers to test employees for drugs and/or alcohol but requires the employer "adhere to the requirements . . . concerning the conduct of such testing and the use and disposition of the results."

Iowa Code section 730.5(1)*i* allows drug testing of an employee upon "reasonable suspicion" that an employee's faculties are impaired on the job or on an unannounced random basis. Iowa Code § 730.5(4). Testing shall include confirmation of initial positive test results. For breathalyzer testing, initial and confirmatory testing may be conducted pursuant to the employer's written policy. A policy shall include requirements governing breath testing devices, alcohol screening devices, and qualifications for administering personnel consistent with DOT rules. If an oral fluid sample is taken and results are received in the presence of the employee, this is considered a sufficient sample for split sample testing. Iowa Code § 730.5(7)*f*. Iowa Code section 730.5(7)(i)(1) mandates that if a medical review officer (MRO) reports a positive test result to the employer, upon a confirmed positive drug or alcohol test by a certified laboratory, the employer must notify the employee of the test results by certified mail return receipt requested, and the right to obtain a confirmatory or split-sample test before taking disciplinary action against an employee.

Iowa Code section 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing. Upon a positive drug screen, Iowa Code section 730.5(9)(g) requires, under certain circumstances, that an employer offer substance abuse evaluation and treatment to an employee the first time the employee has a positive alcohol test. The statute provides that 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, 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 "g". Iowa Code section 730.5(10)(a)(1) provides that the employer may require that the employee enroll in an employer-provided or approved rehabilitation, treatment, or counseling program, which may include additional drug or alcohol testing, participation in and successful completion of which may be a condition of continued employment, and the costs of which may or may not be covered by the employer's health plan or policies.

The Iowa Supreme Court has held that an employer may not “benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits.” *Eaton v. Iowa Emp’t Appeal Bd.*, 602 N.W.2d 553, 557, 558 (Iowa 1999).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

In this case, the employer did not participate in the hearing. Mr. Borsch agrees that he was discharged but believes that he should have been given the opportunity to get treatment. The employer failed to show that it adhered to the strict and explicit statutory requirements in Iowa law in order to use the results of the drug screen as a basis for disqualification from benefits. Benefits are allowed.

DECISION:

The December 22, 2020, (reference 02) unemployment insurance decision is reversed. Mr. Borsch was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.



Daniel Zeno
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March 11, 2021
Decision Dated and Mailed

dz/lj