

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DOUGLAS SCHRECK**  
Claimant

**APPEAL NO: 15A-UI-08034-JE-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FOODS INC**  
Employer

**OC: 06/21/15**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge/Misconduct

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the July 14, 2015, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on August 14, 2015. The claimant participated in the hearing. The employer did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice.

**ISSUE:**

The issue is whether the employer discharged the claimant for work-connected misconduct.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time meat department manager for Foods Inc. from October 16, 1993 to June 26, 2015. He was discharged for being intoxicated while at work.

The claimant attended a get-together away from work June 14, 2015, and consumed alcohol until the early morning hours of June 15, 2015. He had never missed a day of work and wanted to preserve his record so he reported to work June 15, 2015, at 6:30 a.m. The store director came in and could smell alcohol on the claimant's breath. The employer asked the claimant if he had been drinking and the claimant indicated he had consumed alcohol the night before. The employer asked the claimant to consent to a breath alcohol test and the claimant agreed to do so. The employer then drove the claimant to a testing facility near Iowa Lutheran Hospital on Penn Avenue in Des Moines. The claimant provided two breath samples, 15 minutes apart, and was told he was above the allowed limit but does not know what the breath alcohol results were or what amount is allowed by the employer. After the test was completed, the employer transported the claimant home and notified him he was suspended pending further investigation.

The claimant entered in-patient treatment for alcohol abuse June 24, 2015, on his own. The claimant's wife called the employer June 26, 2015, to ask about his job status and the employer told her to have the claimant call. The claimant called the employer and was told his employment was terminated. The employer did not offer the claimant any rehabilitation. There is no evidence the employer had a written substance abuse policy.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying misconduct. 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).

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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

Iowa Code section 730.5 provides the authority under which a private sector employer doing business in Iowa may conduct drug or alcohol testing of employees. In Eaton v. Employment Appeal Board, 602 N.W.2d 553 (Iowa 1999), the Supreme Court of Iowa considered the statute and held "that an illegal drug test cannot provide a basis to render an employee ineligible for unemployment compensation benefits." Thereafter, in Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003), the Iowa Supreme Court held that where an employer had not complied with the statutory requirements for the drug test, the test could not serve as a basis for disqualifying a claimant for benefits. In the present case, the employer had reasonable suspicion to request a breath alcohol test, but the employer's written policy failed to comply with Iowa Code section 730.5. Accordingly, the breath test was not authorized by law and cannot serve as a basis for disqualifying the claimant for unemployment insurance benefits.

Iowa Code section 730.5(1)(i) defines "reasonable suspicion" that would justify a drug test. In this case, the employer had a reasonable suspicion the claimant had consumed alcohol given the odor of alcohol emanating from him. However, the presence of reasonable suspicion is only one factor to be considered. Other factors set forth at Iowa Code section 730.5 must be considered before the breath alcohol test can serve as a basis for discharging the claimant from employment.

Iowa Code section 730.5(9)(h) provides that, "In order to conduct drug or alcohol testing under this section, an employer shall require supervisory personnel of the employer involved with drug or alcohol testing under this section to attend a minimum of two hours of initial training and to attend, on an annual basis thereafter, a minimum of one hour of subsequent training. The training shall include, but is not limited to, information concerning the recognition of evidence of employee alcohol and other drug abuse, the documentation and corroboration of employee alcohol and other drug abuse, and the referral of employees who abuse alcohol or other drugs to the employee assistance program or to the resource file maintained by the employer pursuant to paragraph "c", subparagraph (2).

The employer did not participate in the hearing and provide any evidence that the employer personnel, who determined there was a reasonable suspicion to test the claimant for alcohol consumption, had undergone the primary and supplemental training required by the code.

Iowa Code section 730.5(9) sets forth requirements the employer's drug testing policy must meet before drug/alcohol testing will be authorized under the statute. Iowa Code section 730.5(9)(e) provides: If the written policy provides for alcohol testing, the employer shall establish in the written policy a standard for alcohol concentration which shall be deemed to violate the policy. The standard for alcohol concentration shall not be less than .04, expressed in terms of grams of alcohol per two hundred ten liters of breath, or its equivalent. There is no evidence establishing the employer's policy complies with the statute.

Iowa Code section 730.5(9)(g) provides as follows:

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.

The employer has over 50 employees and the claimant has worked for the employer for over 22 years. He never had an incident involving other drugs or alcohol in the past. The employer failed to notify the claimant that he had the right to discuss, pursue and participate in alcohol abuse rehabilitation prior to being discharged from the employment. The claimant sought treatment on his own and has been sober since June 26, 2015.

Because the evidence does not establish that the employer's drug and alcohol testing policy complies with Iowa Code section 730.5 the breath alcohol test obtained on June 15, 2015, was not authorized by law. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes the claimant was discharged for no disqualifying reason. Therefore, benefits are allowed.

**DECISION:**

The July 14, 2015, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

je/pjs