

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

YOHANA L KAK
Claimant

APPEAL NO. 14A-UI-04120-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TPI IOWA LLC
Employer

OC: 03/30/14
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Yohana Kak, appealed an unemployment insurance decision dated April 21, 2014, reference 01, that concluded he was discharged for work-connected misconduct. A telephone hearing was held on May 27, 2014. The parties were properly notified about the hearing. Kak participated in the hearing with interpreter, Zahra Bouhouch. Danielle Williams participated in the hearing on behalf of the employer.

ISSUE:

Was Yohana Kak discharged for work-connected misconduct?

FINDINGS OF FACT:

Yohana Kak worked full time as a production worker from October 2012 to March 26, 2014. He understood that employees were prohibited from reporting to work under the influence of alcohol, were subject to testing for alcohol, and could be discharged for testing positive for alcohol. The employer's work rules provide for testing of employees who a supervisor reasonably suspect have reported to work after consuming alcohol and deems a refusal to test as a positive test result. The employer uses an alcohol-screening process that involves using a swab to collect saliva for testing. If the test is positive, the employee is taken to the hospital where a breathalyzer test is administered as a confirmation test.

Kak was scheduled to work a 12-hour shift starting on 5 p.m. on March 25 and ending at 5 a.m. on March 26.

The manager on duty, Chad Cheek, had received reports from employees that Kak smelled of alcohol. At approximately 4:30 a.m. on March 26, Cheek told Kak to go to the office. Kak has limited English-language skills. When he asked why he was going to the office, Cheek said something that he did not understand and said he would explain it in the office. Kak said he needed an interpreter because he did not understand but Cheek would not provide an interpreter.

When they arrived at the office, there were three supervisors and the night-shift human resources representative, Dennise Schmidt, there. Cheek started talking about Kak taking an alcohol test, but Kak did not understand much of what Cheek was saying. Kak had been experiencing stomach pain during his shift and requested to use the bathroom. Cheek told him that he could not go to the bathroom until he took the test, but again Kak did not understand fully what Cheek said. When Kak insisted to use the bathroom because of the sharp pain in his stomach, his shift supervisor, Koby Pagel, accompanied him to the bathroom and stood there while he used the bathroom. Cheek and Schmidt considered Kak not submitting to the alcohol test as a refusal and decided he was discharged.

When Kak came back to the office, Cheek told him that he was being sent home. Kak waited in the lobby with Pagel for a taxi to take him home. While he and Pagel—with whom Kak had regularly worked for some time—talked, Kak finally understood that the employer was discharging him for not taking an alcohol test. He told Pagel that he would take an alcohol test because he had not had any alcohol. Pagel then told Cheek that the claimant had decided to take the test, but Schmidt told Cheek that testing was no longer an option because Kak had gone to the bathroom.

Kak had not consumed alcohol while he was working or during the day before he reported to work.

REASONING AND CONCLUSIONS OF LAW:

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

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Iowa Code § 96.6-2; Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (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 findings of fact show how I resolved the disputed factual issues in this case by carefully assessing the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. Kak's testimony was credible and consistent. I believe Kak's testimony that he has limited English language skills and did not understand until he was talking to Pagel in the lobby that the employer wanted him to take an alcohol test. The

employer did not have any witnesses with personal knowledge testify at the hearing. Kak's testimony is entitled to greater weight. As a result, I conclude Kak didn't willfully fail to submit to the alcohol test, which was the basis for his discharge. No willful and substantial misconduct has been proven in this case.

DECISION:

The unemployment insurance decision dated April 21, 2014, reference 01, is reversed. Yohana Kak is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/pjs