

SELECTED ISSUES IN UNEMPLOYMENT INSURANCE ADJUDICATION

[Outline]

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I. Discharges

A. In General

1. The general rule is that an individual is disqualified for unemployment insurance benefits if discharged for misconduct in connection with the individual's employment. See Iowa Code § 96.5-2-a.
2. In general, misconduct is found in deliberate acts or omissions, which constitute a material breach of the worker's duty to the employer or in repeated acts of carelessness or negligence. Poor performance due to inability is not considered misconduct. See 871 IAC 24.32(1).
3. In the case Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979), cert. den. 444 U.S. 852 (1979), the Supreme Court of Iowa accepted the rule cited above as the general definition.
4. The employer has the burden of proof of misconduct. See Iowa Code § 96.6-2.
5. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988).
6. Information acquired after the discharge will not be considered. We have no Supreme Court precedent in this state, but the general rule, with an exception discussed below, is that after-acquired information will not be considered because it could not have been the basis for the decision to discharge.

7. Although the definition of misconduct in 871 IAC 24.32(1) excludes “good faith errors in judgment or discretion,” a claimant’s subjective understanding and intent are not the end of the analysis. “The key question is what a reasonable person would have believed under the circumstances.” See Aalbers v. IDJS, 431 N.W.2d 330, 335-336 (Iowa 1988).

B. Attendance

1. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).
 - a. It must be both excessive and unexcused.
 - b. The concept includes tardiness, leaving early, etc.
2. Absence due to matters of “personal responsibility”, e.g., transportation problems and oversleeping is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984).
3. Absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer. See Higgins, supra, and 871 IAC 24.32(7).
 - a. Here the ALJ will give weight to the employer’s policy on providing notice.
 - b. The ALJ will also consider circumstances such as the sudden illness of a family member, especially a small child.
 - c. Unreported absences due to mental incapacity or the nature of the reason for absence will be considered excused. See Roberts v. IDJS, 356 N.W.2d 218 (Iowa 1984), and Gimbel v. Employment Appeal Board, 489 N.W.2d 36 (Iowa App. 1992).
4. A single unexcused absence did not constitute misconduct even in a case in which the worker disregarded the employer’s instruction to call back with a status report after the worker saw the doctor. See Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989).

5. Practice Tips:

- a. Remember the last straw doctrine. A worker discharged for nine unexcused instances of tardiness with the final incident an absence due to illness properly reported to the employer will not be disqualified.
- b. Remember Sallis. A worker discharged for nine instances of absence due to illness properly reported with the final incident an unexcused tardiness will not be disqualified.
- c. The ALJ applies state law, not employer attendance policies. Many employers have adopted no-fault attendance policies. The ALJ will disregard the policy except for the provisions on giving notice.
- d. In some cases, the ALJ has disregarded “unreasonable” policies on giving notice, as when an employer requires 16 hours of notice that an employee will be absent the following day. These decisions have been upheld by the Employment Appeal Board but have not been appealed further.

C. Insubordination

1. General rule: continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).
2. Failure to perform a specific task does not constitute misconduct if the failure is in good faith or for good cause. See Woods v. IDJS, 327 N.W.2d 768 (Iowa App. 1982).
3. The ALJ will analyze this type of case by evaluating both the reasonableness of the employer’s request in light of all circumstances with the worker’s reason for non-compliance. See Endicott v. IDJS, 367 N.W.2d 300 (Iowa App. 1985).
4. Example. Refusing overtime with only five minutes’ notice was not misconduct in the case Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

D. Language

1. Profanity or other offensive language in a confrontational or disrespectful context may constitute misconduct, even in isolated situations or in situations in which the target of the statements is not present to hear them. See Myers v. EAB, 462 N.W.2d 734 (Iowa App. 1990), overruling Budding v. IDJS, 337 N.W.2d 219 (Iowa App. 1983).
2. This is ordinarily a fact question for the ALJ. See Myers, supra.
3. Threats that an employer should stay out of a worker's way or he would be sorry constituted misconduct in Henecke v. IDJS, 533 N.W.2d 573 (Iowa App. 1995). The Court stated that an employer has the right to expect decency and civility from its workers and that evidence of threats could be found both in words and body language.
4. Practice tip: ALJs often hear the excuse that "everybody" at the workplace uses foul language. Please provide any applicable written policy and evidence of consistency or inconsistency in its enforcement.

E. Fighting

1. Off premises during lunch hour, one worker assaulted another for alleged rumors spread at work by the co-worker. Noting the lack of evidence of negative impact at the work place plus the fact that the worker was not discharged until the end of the day, the Court of Appeals allowed benefits. See Diggs v. EAB, 478 N.W.2d 432 (Iowa App. 1991).
2. Typical analysis focuses first on whether the claimant was the instigator of the incident, whether or not the claimant threw the first punch. If the claimant was not the instigator, the ALJ then typically looks for evidence of whether the claimant could have retreated or whether the claimant fought as a matter of self-defense because there was no other alternative. This approach comes from the Court of Appeals' analysis in Savage v. EAB, 529 N.W.2d 640 (Iowa App. 1995).

F. Off-duty Conduct

1. Violation of a specific work rule, even off-duty, can constitute misconduct. In Kleidosty v. EAB, 482 N.W.2d 416, 418 (Iowa 1992) the employer had a specific rule prohibiting immoral and illegal conduct. The worker was convicted of selling cocaine off the employer's premises. The Court found misconduct.
2. In its analysis, the Court stressed the importance of a specific policy, even one which was stated only in terms of illegal or immoral conduct.
3. In light of Kleidosty, I question whether Diggs, supra, is still good law.

G. Gross Misconduct – Iowa Code § 96.5-2-b & c

1. If the claimant is discharged for an act constituting an indictable offense, providing the claimant has been convicted of the offense or has admitted in writing to committing the act, all wage credits earned prior to the date of discharge are cancelled.
2. An unemployment insurance case may be redetermined within five years of the original claim date in these circumstances.
3. This is the sole exception to the rule that after-acquired information cannot be used. Of course, the employer must have known of the act and discharged the claimant because of the act later determined to be the indictable offense.

H. Carelessness and Negligence

1. Lee v. EAB, 616 N.W.2d 661 (Iowa 2000). Claimant, a snowplow operator for Mitchell County, was discharged after two accidents which had happened in quick succession after other accidents more remote in time. In lieu of discharge, claimant was offered a two-week suspension if he agreed to submit to drug and alcohol testing. When Lee refused, he was discharged.
2. Court analysis focused on lack of evidence that the final two accidents were within claimant's control. Thus, there was no final, current act.

3. Court also criticized the EAB's (and the ALJ's) reliance on the refusal to take the suspension and submit to testing as evidence tending to show that he did not care about improving his performance.
4. The Board consistently holds that cash register errors, especially in high-volume establishments like convenience stores and fast-food restaurants do not descend to that level of careless or negligence justifying disqualification.
5. Flesher v. IDJS, 372 N.W.2d 230 (Iowa 1985). Claimant who had received three prior warnings for identical conduct was fired after failing for the fourth time to follow security policies. This was held to constitute disqualifying careless misconduct.

II. Quits

A. In General

1. Claimants who voluntarily leave employment without "good cause attributable to the employer" are disqualified for benefits. See Iowa Code § 96.5-1.
2. A claimant requalifies by working in and being paid wages for insured work equal to 10 times the individual's weekly benefit amount.
3. The claimant has the burden of proof in cases involving quits. See Iowa Code § 96.6-2.
4. In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992).
5. In an unreported decision, the District Court has ruled that a claimant with limited English skills did not leave work voluntarily when he mistakenly believed that he had been fired.

6. Prior notification of the employer before a resignation for a medical reason is required. The evidence must show that before resigning the claimant 1) put the employer on notice of the condition, 2) warned the employer that he/she may quit if the situation is not addressed and 3) gave the employer a reasonable opportunity to address legitimate grievances. See Suluki v. EAB, 503 N.W.2d 402 (Iowa 1993).
 7. Prior notification of the employer before a resignation for other reasons is not required. See Hy-Vee v. EAB, 710 N.W.2d 1 (Iowa 2005).
- B. Quits Deemed to be With Good Cause Attributable to the Employer
1. See in general 871 IAC 24.26.
 2. Substantial change in the contract of hire.
 - a. 871 IAC 24.26(1).
 - b. ALJs interpret this to mean substantial change in the conditions of employment.
 - c. In analyzing such cases the courts look at the impact on the claimant rather than the employer's motivation. See Dehmel v. EAB, 433 N.W.2d 700 (Iowa 1988). Here the employer, faced with an economic downturn, tried to avoid layoffs by reducing the hours of all employees. Dehmel quit because of the reduction and eventually prevailed.
 - d. An employee acquiesces in a change if he or she does not resign in a timely manner. See Olson v. EAB, 460 N.W.2d 865 (Iowa App. 1990).
 - e. A wage reduction pursuant to collective bargaining does not give an individual good cause attributable to the employer to quit. The right of the individual to deal directly with the employer is surrendered to the bargaining agent through the collective bargaining process. See Efkamp v. IDJS, 383 N.W.2d 566 (Iowa 1986).
 - f. Other examples include unsafe, illegal or detrimental or intolerable working conditions.

C. Quits Without Good Cause Attributable to the Employer

1. See 871 IAC 24.25.
2. The regulations here are a laundry list derived from court decisions and agency experience. Here is a portion of the list:
 - a. Quits because of a lack of transportation.
 - b. Quits to move to a different locality or to accompany a spouse to a different locality.
 - c. Absence without contact for three days in violation of company policy.
 - d. Quits because of dissatisfaction with a known rate of pay.
 - e. Quits because of a lack of childcare.
 - f. Quits because of inability to work with supervisors or fellow workers.
 - g. Quits to take a vacation.
 - h. Quits after being reprimanded.

D. Quits to Avoid Violence

1. A claimant is not disqualified for resigning rather than crossing a picket line in the face of real threats of violence. See Ames v. EAB, 439 N.W.2d 669 (Iowa 1989) overruling Deere Mfg. Co. v. IESC, 90 N.W.2d 750 (Iowa 1958).
2. Mere speculation of violence is insufficient to justify quitting. There must be some evidence that would place a reasonable person in fear of violence. Ames, supra.
3. The analysis has been used to allow benefits to employees who quit due to domestic violence where some of the confrontations and threats had occurred on company property. This extension has not been challenged in the courts yet.

E. Quits to Accept Other Employment

1. See Iowa Code § 96.5-1-a.
2. In this situation separation from the first employer is not a disqualifying event, and the first employer is not charged for benefits paid to the claimant.
3. The record must establish the existence of a bona fide offer of employment which the claimant accepted before resigning and for whom the claimant performed services.
4. If the claimant requests benefits between the two jobs, the ALJ will inquire if the claimant had the opportunity to work up to the time the new job began.

F. Temporary Employees of Temporary Employment Firms

1. See Iowa Code § 96.5-1-j.
2. At the completion of an assignment with a temporary employment firm, a claimant must contact the firm within three working days to seek reassignment or face disqualification for benefits pursuant to the section listed above.
3. This is applicable only if the firm has notified the worker in writing at the time of employment with the firm of his or her responsibility to do so. The document must be separate from any contract of employment, and the firm must give a copy of the notice to the worker.
4. In the absence of strict compliance with the terms of Iowa Code § 96.5-1-j, the provisions of 871 IAC 24.26(19) remain in effect. That is, an election not to seek further assignment is not construed as a voluntary quit.

III. Refusal of Work or Refusal of Recall

- A. The general rule is that an individual is disqualified for benefits for refusing a suitable offer of work, referral by the agency to suitable work or a recall to suitable work. See Iowa Code § 96.5-3.

- B. There is a two-part test for suitability.
 - 1. Wage suitability.
 - a. One hundred percent of the average weekly wage in the base period if work is offered in the first five weeks of unemployment.
 - b. Seventy-five percent if offered during the sixth through twelfth weeks of unemployment.
 - c. Seventy percent if offered in the thirteenth through eighteenth weeks of unemployment.
 - d. Sixty-five percent if offered after the eighteenth week.
 - 2. Job suitability.
 - a. Degree of risk to health, safety and morals.
 - b. Individual's physical fitness.
 - c. Prior training and experience.
 - d. Prospects of finding employment in claimant's normal occupation.
 - e. Commuting distance.
 - f. Other "reasonable" factors.
- C. Caveats.
 - 1. An individual need not accept a job paying less than the federal minimum wage.
 - 2. Refusal to fill a vacancy caused by a strike or lockout will not result in disqualification.
 - 3. Refusal of job whose pay, hours or conditions are "substantially less favorable" than those prevailing for similar work in the locality will not result in disqualification.

4. Refusal of a job that would require union membership, require resignation from union membership or require a promise to refrain from union membership will not result in disqualification.
 5. An offer of temporary work is not per se unsuitable. Suitability of work is a question of fact, and the temporary nature is one fact to be considered in the evaluation. See Norland v. Iowa Department of Job Service, 412 N.W.2d 904 (Iowa 1987).
- D. Technical Rules – See 871 IAC 24.24.
1. There must be a bona fide offer of work for an actual vacancy, specifying such things as duties, rate of pay, days and hours of work, etc.
 2. The offer must be made by “personal contact.”
 3. A registered letter constitutes personal contact only for recall to work.
 4. Both the offer and the refusal must occur during a claimant’s benefit year for the agency to have jurisdiction to determine if the refusal was a disqualifying event.
 5. Notwithstanding number one above, an individual who willfully discourages a prospective employer from making a suitable offer will be disqualified for benefits.
- E. Penalty for refusal of suitable work.
1. Ordinarily, a claimant must requalify by earning ten times his or her weekly benefit amount in wages for insured work.
 2. If, however, the person refuses work for a reason that makes him or her ineligible for benefits under Iowa Code § 96.4-3, denial of benefits is on a week-by-week basis. See 871 IAC 24.24(4).
 3. Examples: 1. The claimant is ill or injured and medically unable to work. 2. The claimant lacks transportation, adequate childcare, etc., and so is unavailable for work.

IV. Issues Involving Part-Time Employees

- A. An individual discharged for misconduct from part-time employment is completely disqualified for benefits until requalifying by earning ten times his or her weekly benefit amount in wages for insured work. See Iowa Code § 96.5-2-a.
- B. An individual who quits part-time employment without good cause attributable to the employer can receive unemployment insurance benefits if he or she has sufficient wage credits from other employers to be monetarily eligible. Wages from the part-time employer the claimant left voluntarily will not be used for computing future benefits until the individual has earned subsequent wages for insured work equaling ten times his or her weekly benefit amount. See Welch v. IDJS, 421 N.W.2d 150 (Iowa App. 1998) and 871 IAC 24.27.
- C. Partial unemployment.
 - 1. The general rule is that an individual working less than his or her **regular hours and earning less than his or her** weekly benefit amount plus \$15.00 is partially unemployed. See Iowa Code § 96.19-38-b.
 - 2. Questions arise when a part-time employee's workweek fluctuates. Fact patterns tend to follow one of three scenarios:
 - a. An individual works a set number of hours per week year round has his or her hours reduced.
 - b. An individual's hours of work fluctuate seasonally.
 - c. An individual's hours vary week by week as dictated by business conditions.
 - 3. ALJs will look for evidence to establish which scenario a particular case most resembles. The evidence may include a written agreement between employer and employee as to the hours of work, past practice and, especially for scenario number two, whether the number of hours offered since the present claim for unemployment insurance benefits is less than the number of hours of work offered a year earlier.

V. Temporary and On-Call Employment

A. Temporary employment.

1. The general rule is that an individual who is hired to work for a specific period of time or until a completion of a specific task fulfills his or her agreement when each job is completed. An election not to report for further assignment is not considered a quit. See 871 IAC 24.16(19).
2. Exceptions.
 - a. The general rule does not apply to substitute employees of educational institutions.
 - b. The rule does not apply to temporary employees of temporary employment firms who have complied with the provisions of Iowa Code § 96.5-1-j. See Section II F.

B. On-Call Employment.

1. Substitute workers who make themselves available for work from only one employer and who do not accept other employment are not available for work and are not eligible for unemployment insurance benefits. See 871 IAC 24.22(2) i(1).
2. An individual whose wage credits consist entirely of wages for on-call work is not considered to be unemployed. See 871 IAC 24.22(2) i (3).

VI. Work Stoppage Incident to a Labor Dispute

A. See Iowa Code § 96.5-4 and 871 IAC 24.33 & 34.

B. In general, unemployment insurance benefits are denied to striking workers if the evidence establishes that a work stoppage exists.

1. A lockout is not a work stoppage if the workers are willing to continue work under the status quo past the end of the contract while negotiations continue but the employer is unwilling to do so. See Alexander v. EAB, 420 N.W.2d 812 (Iowa 1988).

2. Stoppage of work refers to curtailment of employer's operations, not the claimants' absence from work. See Crescent Chevrolet v. IDJS, 429 N.W.2d 148 (Iowa 1988).
3. A work stoppage ends when the employer's operations return to a substantially normal basis which may be before or after termination of the labor dispute. Crescent Chevrolet, supra.
4. A stoppage may occur due to a strike in one department even if the employer continues operations by replacing strikers temporarily with workers from other departments. Crescent Chevrolet, supra.
5. The test for whether an individual is covered by this section of the law is not whether the claimant belongs to the union but whether the claimant is in a bargaining unit which is participating in, financing or directly interested in the labor dispute. Iowa Code § 96.5-4-a & b.
6. Permanent replacement of a striking worker severs the employment relationship and ends the labor dispute disqualification. See Bridgestone/Firestone v. EAB, 570 N.W.2d 85 (Iowa 1997).

VII. Health-Related Issues

A. No Separation from Employment.

1. An individual must be able to work in order to be eligible for unemployment insurance benefits. See Iowa Code § 96.4-3.
2. The claimant must establish that she or he is physically and mentally capable of work in gainful employment, whether or not in the individual's customary occupation. See Geiken v. Lutheran Home for the Aged, 468 N.W.2d 233 (Iowa 1991) and 871 IAC 24.22(1)b.
3. Employers must make reasonable accommodations for employees with disabilities. See Sierra v. EAB, 508 N.W.2d 719 (Iowa 1993) and Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162 (Iowa 1982).

4. An employer who will not do so due to its policy of not providing light-duty work to its employees may lose a case in which a claimant with a medical restriction can establish his or her ability to perform some job available in the local labor market.

B. Issues Involving Separation

1. Quit or Discharge?

- a. A separation due to medical reasons is not always a quit. In Wills v. EAB, 447 N.W.2d 137 (Iowa 1989), the Supreme Court considered the case of a pregnant CNA who went to her employer with a physician's release that limited her to lifting no more than 25 pounds. Wills filed a claim for benefits after the employer did not let her return to work because of its policy of never providing light-duty work. Reversing the agency, the Supreme Court ruled that Wills became unemployed involuntarily.
- b. Earlier, in Hedges v. IDJS, 368 N.W.2d 862 (Iowa App. 1985), the Court of Appeals dealt with a CNA who requested and received a medical leave of absence in May and again after two days of work in August due to heart and emotional problems. When she attempted to return to work in November with a lifting restriction, the employer refused to reinstate her. Although the Court did not consider whether Hedges voluntarily separated from employment, its statement of facts shows that she initiated the May and August separations. It also did not address the question of whether the employer was required to make a reasonable accommodation, but affirmed a disqualification based on Iowa Code § 96.5-1-d, which deals with voluntary separations from employment for medical conditions unrelated to work.
- c. This is a developing area of the law, currently fact-driven while we await further reported decisions.

2. Quits Due to Medical Conditions Caused or Aggravated by Employment.

- a. Where illness or injury directly connected to the employment makes it impossible for an individual to continue in employment because of serious danger to health, a resignation is deemed to be for good cause attributable to the employer even if the employer is free from negligence and all wrongdoing. See Raffety v. IESC, 76 N.W.2d 787 (Iowa 1956).
 - b. Raffety has been expanded to cover situations in which an existing medical condition is aggravated by working conditions. Shontz v. IESC, 248 N.W.2d 88 (Iowa 1976).
3. Quit Due to Medical Condition Unrelated to Employment
- a. Resignation due to a medical condition unrelated to the employment is not considered to be for good cause attributable to the employer. Wolf's v. IESC, 244 Iowa 999, 59 N.W.2d 216 (1953).
 - b. Iowa Code § 96.5-1-d, enacted after the Wolf's decision, gives a claimant another method of requalifying after voluntarily separating due to a medical condition unrelated to the employment. If the claimant returns to the employer with a release to return to work and the individual's regular work or comparable suitable work is not available, the individual may receive unemployment insurance benefits.
 - c. In the case of a medical condition unrelated to the employment, the physician's release must be unconditional. See Hedges, supra.

4. Choice of Doctor

There is no provision in Iowa Code Chapter 96, in agency regulations or in case law giving the employer the right to choose the doctor. Thus, if a claimant's physician recommends resignation due to a work-related injury while the company doctor does not, the agency will allow benefits.

5. Quit as Part of Workers' Compensation Settlement
 - a. No Iowa cases are on point, but it is a situation that comes up from time to time.
 - b. In Edward v. Sentinel Management Co., 611 N.W.2d 366 (Minn. App. 2000) the claimant resigned as part of a workers' compensation settlement package. Minnesota court denied benefits noting that the claimant could have continued working while pursuing his claim. The evidence in the case established that the claimant could still perform his work and was doing so while the negotiations continued. The court found the situation analogous to a person negotiating for early retirement while work was still available.
 - c. Distinguish this from the situation in Larson v. Michigan Employment Security Commission, 140 N.W.2d 777 (Michigan App. 1966) in which the Michigan court allowed benefits to a severely injured worker who could not perform his former duties and for whom the alternatives were remaining employed with no income or resigning in order to receive income.
 - d. Iowa ALJs tend to follow these lines of analysis and make similar distinctions.

VII. Pensions, Vacation Pay, Severance Pay, and Holiday Pay

- A. Pensions are deductible dollar for dollar from unemployment insurance benefits to the same extent that a base-period employer has contributed to the pension fund. See Iowa Code § 96.5.5-c.
- B. Social security pensions are not deductible.
- C. Vacation pay given to a claimant in connection with the separation from employment is deducted dollar for dollar from unemployment insurance benefits with the following restrictions:
 1. Unless the employer makes a timely designation of another period, all vacation pay is attributed to the first week of unemployment.

2. Within ten days of mailing of the Notice of Claim, an employer may designate a different period of time to which the vacation pay must be attributed. See Iowa Code § 96.5-7.
 3. The wording of Iowa Code § 96.5-7 creates problems for claimants and employers because claimants normally file their first weekly claims before they or IWD know how the employer will report the vacation pay.
- D. Severance pay is deducted dollar for dollar from unemployment insurance benefits.
- E. Holiday pay is treated as regular wages and is deductible from unemployment insurance benefits according to the formula found in 871 IAC 24.18. Thus, if the holiday pay is less than 25% of the weekly benefit amount there will be no reduction in benefits. If the holiday pay exceeds the weekly benefit amount plus fifteen dollars, no benefits will be paid. Holiday pay in between these two amounts will result in payment of partial benefits.

IX. Drug Testing

- A. Eaton v. EAB, 602 N.W.2d 553 (Iowa 1999) is the leading case. Eaton had been discharged for violating a no smoking policy. He was hired back under a last chance agreement, approved by his union that required, among other things, that he “submit to a random drug testing” at the company’s request. After missing one day of work due to a foot problem, the company requested a drug test. It was positive for marijuana and cocaine. The ALJ and EAB denied benefits, reasoning that the last chance letter was a waiver of the protections offered by §730.5. The Court disagreed, finding that the provision in the last chance letter was unenforceable because it violated the statute.
- B. In Harrison v. EAB, 659 N.W.2d 581 (Iowa 2003), the Supreme Court ruled that the employer did not even substantially comply with the notice requirements of Iowa Code §730.5(7)(i)(1). The claimant was not informed in writing of his right to have a second confirmatory test done at his expense. He was not told that he could choose the laboratory to conduct the test or that he had seven days to make his decision. He was also given a significantly inflated price for the test.

- C. Another issue that comes up frequently is whether the test is given pursuant to federal or state law. The requirements differ. We will need evidence of which law governs. It would be helpful to provide us with a copy of the federal regulations if the test is one mandated by federal law.
- D. Selected provisions of Iowa drug testing law for private employers.
1. Reasonable Suspicion Testing - §730.5(1). Must show at least one of the following:
 - a. Observable phenomena;
 - b. Abnormal/erratic behavior;
 - c. Report from reliable/credible source;
 - d. Evidence of test tampering;
 - e. Caused accident resulting in OSHA reportable injury or property damage more than \$1,000.00; or
 - f. Evidence of drug activity while working or on premises.
 2. Random Testing - §730.5(1)k.

Persons selected by computer-based random number generator process by independent entity. Pool may be subset of all employees, e.g., safety-sensitive positions.
 3. Treatment Testing

During or upon completion of drug or alcohol rehabilitation.
 4. Testing Protocol
 - a. Timing/Costs - §730.5(6)
 1. During or immediately before/after scheduled work period; and
 2. All costs paid by the employer (excluding cost of testing of secondary sample).

- b. Procedures - §730.5(7)a
 - 1. Sanitary and privacy protecting conditions (if urine, secured by visual inspection, restricted access);
- c. Split samples at time of collection - §703.5(7)b
 - 1. If urine, primary sample must be at least 30 ml, secondary sample must be at least 15 ml.
 - 2. Second sample stored at least 45 days after a positive test.
- d. Opportunity to provide information that might affect test results (may be offered by medical review officer after initial positive results) - §730.5(7)c(2). The employer must inform employee of drugs to be tested.
- e. Confirmatory Drug Testing - §730.5(7)i(1)
 - 1. Must have confirmed positive testing by certified laboratory before disciplinary action.
 - 2. Confirmation test must use different chemical process than an initial screen, e.g., chromatographic technique (gas chromatography/mass spectrometry), except that the employer's policy can provide for alcohol testing by qualified devices and personnel.
- f. Resulting Reporting - §730.5(7)i(1)&(2)
 - 1. If a confirmed positive result is received by the employer, the employer must notify the employee by certified mail, return receipt requested of the results of the test and the right to request and obtain a confirmatory test of the secondary sample.
 - a. Certified lab of the employee's choosing;

- b. Fee payable to the employee for expenses only, comparable to costs of employer's initial test; and
- c. Seven days from date of mailing of retesting rights notice to pay and request retesting.

5. Policies - §730.5(9)

- a. Must be written.
- b. Uniform standards for actions that will be taken in case of confirmed positive test or refusal to submit to testing.
- c. Awareness program.
 - 1. Inform all employees of EAP, post notices; or
 - 2. Have resource file of treatment programs, mental health providers, etc.
- d. if alcohol testing included, must specify alcohol concentration for violation, less than .04.
- e. Rehabilitation – if employee with positive alcohol test has been employed with the employer at least 12 months (within the last 18 months) and the employer has more than 50 employees, policy must provide for rehabilitation (with allocation, limitations of costs). The employer can discipline/discharge for failure to comply with rehabilitation.
- f. Training of supervisors - §730.5(9)h
 - 1. Two hours initially and one hour thereafter annually at a minimum.
 - 2. Recognition of evidence of alcohol and drug abuse.
 - 3. Referral to EAP or other resource.

E. Caveats.

1. An employer's potential liability for monetary damages and reinstatement of an employee improperly fired for failing a drug or alcohol test under Iowa Code § 730.5 is beyond the jurisdiction of IWD. Employers have been sued successfully in court for discharging employees under these circumstances while not following the provisions of the statute. Employers should obtain the assistance of legal counsel when establishing and implementing a drug testing policy.
2. In Tow v. Truck Company of Iowa, 695 N.W.2d 36 (Iowa 2005) the Supreme Court affirmed a money judgment against an employer who offered to work to a prospective employee whose drug test was "inconclusive" only if the employee paid for the retest himself.
3. §730.5 establishes only to private employers. It does not apply to employers in the public sector.
4. Some employers, for example those in the transportation industry, may be subject to federal law not covered in this outline. See, for example, 49 CFR Part 40.

X. Procedural Issues and Matters

- A. Unemployment insurance hearings before ALJs from Workforce Development or the Division of Administrative Hearings are contested case proceedings pursuant to Chapter 17A.
- B. The rules of evidence are found in Section 17A.14(1).
 1. Irrelevant, immaterial or unduly repetitious evidence "should" be excluded.
 2. There is no residuum rule. All evidence may be hearsay.
 3. In evaluating hearsay, the ALJ should conduct a common sense evaluation of:
 - a. the nature of the hearsay,
 - b. the availability of better evidence,
 - c. the cost of acquiring better evidence,

- d. the need for precision and
 - e. the administrative policy to be fulfilled. Schmitz v. Iowa Department of Human Services, 461 N.W.2d 603, 607 (Iowa App. 1990).
4. Having said that, let me hasten to add that hearsay evidence, even though admissible, is often not the best evidence. If possible, have witnesses who have first-hand information participate in the hearings, especially if you have the burden of proof.
- C. Amendment to Chapter 17A.
- 1. An amendment to § 17A.10 effective July 1, 1999, provides that contested cases in which the agency is a named party or real party in interest shall be heard by the agency director or by an ALJ from the Division of Administrative Hearings.
 - 2. In the case Fisher v. Board of Optometry Examiners, 476 N.W.2d 48 (Iowa 1991), the Supreme Court of Iowa concluded that an agency is a party to a contested case if it has the legal right to participate in the contested case and actually seeks to do so.
 - 3. Consequently, IWD adopted a regulation found at 871 IAC 26.14(1) whereby it transfers to the Division of Administrative Hearings those cases in which it is the employer and those cases in which any subdivision of the agency actually desires to participate in the contested case hearing.
 - 4. We do not, however, transfer cases on demand unless the moving party can establish that all ALJs must recuse themselves; and we do not transfer a case automatically if a party indicates it will subpoena an agency employee.
 - 5. IWD's ALJs are subject to the Code of Administrative Judicial Conduct mandated by Chapter 17A.
 - 6. By rule, the agency requires that all newly hired ALJs be licensed to practice law in Iowa.
 - 7. See 871 IAC 26 for IWD's rules of procedure for contested cases.

D. Timeliness

1. Iowa Code § 96.6-2 allows ten calendar days for filing protests and appeals from fact-finding determinations.
2. The Supreme Court of Iowa has ruled that the time limit for filing appeals is jurisdictional. See Franklin v IDJS, 277 N.W.2d 877, 881 (Iowa 1979). Following that reasoning, we, the EAB and the District Court have ruled that the time limit for protests is also jurisdictional. Thus, in the absence of a timely protest or timely appeal, the agency does not have jurisdiction to rule on the merits of the case.
3. The Code of Iowa gives an automatic extension until the next regular business day if the last day for filing an appeal falls on a Saturday, Sunday, or other legal holiday.
4. The time limits do not apply if the party does not receive the Notice of Claim or fact-finding decision in time to file a timely protest or appeal. The question becomes whether the party filed within a reasonable amount of time after learning of the Notice of Claim or fact-finding decision.
5. The statute gives thirty days to appeal the employer's Statement of Charges or, in the case of a reimbursable employer, a billing statement. This applies if, and only if, the employer did not receive a Notice of Claim.
6. If filed by mail, an appeal must be postmarked by the final day. If filed by any other means, the agency must receive it by the end of the final day.
7. The agency and the EAB, again following the rationale in the Franklin case, consider these time limits to be jurisdictional.

XI. Special Challenges in Handling Unemployment Insurance Cases

Even with our high volume of hearings, we must continue to meet the U.S. Department of labor's requirement of resolving 60% of all our cases within 30 days, 85% of all our cases within 45 days and 95% of all our cases within 90 days. Without formal pleadings and with only a sketchy record from fact-finding, we often know precious little about a case as we start a hearing.

We strive to be a real people's court, not to be confused with television's version. Institutionally we strive to be as informal as possible while maintaining decorum in the hearing room as well as the appearance and reality of due process. Prohibitions on *ex parte* communications limit what the other ALJs of I may say to you about a pending hearing. Remember, there is no prohibition on general discussions on what we can do to improve our system and its components for the benefit of the people of Iowa.