20090357

IN THE SUPREME COURT

OF THE STATE OF NORTH DAKOTA

Jesse A. Hoffner,	)	
	)	
Appellant.	)	
	)	
vs.	)	Supreme Court No. 20090357
	)	
Job Service North Dakota and	)	
Continental Metal Products.	)	
	)	
Appellees.	)	

APPEAL FROM THE DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
WARD COUNTY, NORTH DAKOTA
THE HONORABLE WILLIAM W. MCLEES PRESIDING

BRIEF OF THE APPELLANT

Richard R. LeMay ID 04665
Legal Services of North Dakota
20 1st St SE Ste 201
PO Box 1666
Minot North Dakota 58702-1666
Attorney for the Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

North Dakota Cases

Other Cases

North Dakota Statutes

Secondary Sources

INTRODUCTION

This is an appeal from a Job Service North Dakota decision denying Jesse Hoffner unemployment compensation benefits. Jesse was employed as a full-time truck driver and equipment operator for Continental Metal Products. Continental Metal Products terminated Jesse's employment on January 26, 2009, due to an alleged "violation of a known company policy."

STATEMENT OF ISSUES

I. **Whether the Bureau's findings of fact are supported by the preponderance of the evidence and sufficiently address the evidence presented to the agency.**

II. **Whether Jesse Hoffner's behavior constitutes misconduct.**

STATEMENT OF THE CASE

Jesse Hoffner's last day of employment with Continental Metal Products was January 26, 2009. (R. 1). Jesse applied for unemployment compensation on January 30, 2009. (R. 1). Jesse was denied benefits by a claims deputy on February 20, 2009. (R. 16). A hearing was held on March 23, 2009. (R. 20). A referee's decision was issued on March 25, 2009, affirming the decision of the claims deputy. (R. 161). The Bureau issued a Decision on Review on April 7, 2009, affirming the referee's decision denying Jesse's unemployment compensation benefits. (R. 202). The Bureau's review constituted the final agency action on Jesse's unemployment compensation claim. (R. 202). Jesse filed a petition for judicial review on May 11, 2009. (R. 203). The district court issued its memorandum and order on September 28,

2009, affirming the Bureau's decision. (R. 209). A judgment was entered on October 19, 2009. (R. 223). Jesse filed a notice of appeal on November 19, 2009. (R. 222).

STATEMENT OF FACTS

The following are facts as summarized in the referee's decision. The underlined portions are facts in dispute:

1. The claimant has worked for the employer on several occasions. His most recent period of employment began on May 20, 2002. He was employed on a full-time basis as a truck driver/equipment operator for which he was paid an hourly wage. The claimant last worked for the employer on January 12, 2009.

2. On January 12, 2009, the claimant reported to work for his regularly scheduled shift. At approximately 9:00 a.m., he told the yard supervisor that he would like to leave work at noon due to the lack of work. Sometime later in this conversation the claimant stated that he was not feeling well.

3. At approximately 9:30 a.m., the office manager notified the claimant that he was scheduled for a drug urinalysis test between 10:15 a.m. and 10:30 a.m. The claimant was scheduled to report to the local medical facility for this test. According to the employer, the claimant was scheduled to be tested due to a visible loss of weight and an increasing pattern of erratic behavior. The claimant said that he would not travel to the medical facility due to the winter travel advisory. He was then instructed to speak to the general manager.

4. The claimant spoke to the general manager and told this individual that he could not undergo the drug urinalysis due to the winter travel advisory. The general manager told the claimant that he had just returned from the post office and was able to make the drive without

incident. The general manager then offered to drive the claimant to the testing facility; however, the claimant refused this offer implying that he would drive himself. Thereafter, the general manager understood that the claimant would undergo the drug urinalysis test.

5. The claimant spoke to a co-worker in the break room sometime around 10:00 a.m. and asked this individual, "Would you piss in a bottle for me?" The co-worker was surprised at the request and did not give a response. Approximately 15 minutes later, the claimant open the door to the break room and asked, "Well" to which the co-worker said "No;" meaning that he would not urinate in a bottle for the claimant`s benefit.

6. During this same time period, the claimant spoke to the yard supervisor about the matter of the drug test. The claimant told the yard supervisor that he was unable to undergo the test due to winter weather conditions. The yard supervisor, however, left the premises a short time later to travel to his home for personal reasons; thus, showing that travel within the city limits was possible.

7. At approximately 11:30 a.m., the medical facility called the employer to inform them that the claimant had not reported for the drug urinalysis test. Thereafter, in accordance with policy, the claimant was prohibited from driving truck due to his failure to undergo the drug screening.

8. On January 13, 2009, the claimant saw a physician concerning ongoing pain in his abdomen. Further diagnosis was required to determine the cause of the abdominal pain.

9. On January 15, 2009, the claimant reported to the employer's premises and spoke to the general manager and the office manager. The claimant was informed that, according to the Department of Transportation regulations, he was considered to have tested positive for a

controlled substance due to his refusal to comply with the testing requirements. If the claimant wanted to retain his employment, he was advised that he would be required to meet with the substance abuse provider (SAP) and undergo the drug screening. During this meeting, the general manager again advised the claimant to take the drug test. The claimant stated that he was too sick to undergo the drug test and that he would not take the test until after seeing his doctor.

10. On January 29, 2009, the employer spoke to the claimant on the telephone and advised him that his employment had been ended as a result of his failure to comply with the testing requirements. The employer also noted that the claimant had previously tested positive for a controlled substance in 1995; making this his second positive test.

11. The claimant is a veteran truck driver and has had a commercial driver license (CDL) for 14 years. According to the claimant, he was not aware that his failure to undergo the drug screening would result in an "automatic positive" under the DOT regulations. The claimant also stated that he was not aware of the employer' s policy regarding his refusal to undergo the test. This policy prohibits the claimant from returning to work until such test is taken and/or passed

(R. 162-163).

SUMMARY OF ARGUMENT

Continental Metal Products' policy concerning drug testing was not adequately published nor fairly implemented. While there was an understanding that two positive drug tests could mean a termination of employment, Jesse's circumstances are outside of a reasonable application of the policy. More so, based upon the evidence Jesse did not violate Continental Metal Products drug policy. Jesse's argument is that Job Service North Dakota cannot use Continental Metal Products fourteen year old drug test from a previous period of employment to deny him unemployment compensation.

The Bureau's conclusions are unreasonable. Based upon a reasoning mind, Continental Metal Products did not meet its burden of proof nor its burden of persuasion by the greater weight of the evidence. Continental Metal Products has the burden to prove: 1) the existence of the employee rule or policy; 2) the facts of its violation; and, 3) the employee's behavior is not justifiable or reasonable. Continental Metal Products failed to prove all three elements.

SCOPE OF REVIEW

The scope of review of the facts found by an administrative agency is limited to determining whether "a reasoning mind could have reasonably determined that the factual conclusions were supported by the weight of the evidence." Blueshield v. Job Service North Dakota, 392 N.W.2d 70, 72 (N.D. 1986). However, that does not mean that every decision of an agency is to be rubber stamped. Even under that restrictive standard, the North Dakota Supreme Court continues to reverse factual findings of Job Service when it is appropriate. See, e.g., Otto v. Job Service North Dakota, 390 N.W.2d 550 (N.D. 1986).

Furthermore, the question of whether certain action is "misconduct," and thus disqualifying, may be a question of law where there is a "clarity of the particular facts and indisputability of the inferences drawn from those facts." Blueshield, supra, at 73. As a matter of law, the conclusion by an administrative agency that conduct is "misconduct" is fully reviewable by the courts, and is not insulated by a protective standard of review. Id.

N.D.Cent.Code § 28-32-46 sets forth the scope review on an appeal from a determination of an administrative agency. A judge of the district court must review an appeal from the determination of an administrative agency based only on the record filed with the court. After a hearing, the filing of briefs, or other disposition of the matter as the judge may reasonably require, the court must affirm the order of the agency unless it finds that any of the following are present:

> 1. The order is not in accordance with the law.
> 2. The order is in violation of the constitutional rights of the appellant.
> 3. The provisions of this chapter have not been complied with in the proceedings before the agency.
> 4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
> 5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
> 6. The conclusions of law and order of the agency are not supported by its findings of fact.
> 7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
> 8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

If the order of the agency is not affirmed by the court, it must be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court. N.D.Cent.Code § 28-32-46.

LEGAL ARGUMENT

I. The Bureau's findings of fact are not supported by the preponderance of the evidence nor does it sufficiently address the evidence presented to the agency.

The Bureau made several findings not supported by the evidence of the record as a whole. Finding number one is incorrect. "The claimant has worked for the employer on several occasions." (R. 162). The evidence is that Jesse worked for Continental Metal Products on two occasions separated by four years. This fact is critical in making a determination whether Jesse violated a known company policy and thus committed "misconduct."

> MR. LEMAY: Can you give me the date when he [Jesse] first worked for Continental Products?
>
> MS. MEYER: Well, he was hired in May of 1995 and worked through probably the middle of 1998 and then came back in May of 02 and worked until January, 2003, and then I think he was probably laid off for a couple months and then came back in May of 2003. Now, I think he was laid off a few times between 03 until now.

(R. 55).

> MR. LEMAY: When did you first go to work for Continental Products?
>
> MR. HOFFNER: 1995.
>
> MR. LEMAY: And, you worked for them until when?
>
> MR. HOFFNER: Approximately, July of 1998.

(R. 93).

Clearly, Jesse's employment from May of 1995 until the middle of 1998 was one period of employment. His employment from May of 2002 until January 26, 2009 was another period of employment. While the second period of employment included lay offs, Jesse was continuously employed with Continental Metal Products.

This fact is critical because the incident in question happened on January 12, 2009, during his second period of employment. To have violated the company policy, Continental Metal Products drug policy must clearly include the fourteen year old drug test from Jesse's first period of employment. Consequently, the Bureau's finding that Jesse was employed on several occasions and not just two times is erroneous and is a critical misapplication of the evidence. It is imperative to Jesse's argument that the trier of fact understand that he worked for Continental Metal Products during two different periods separated by fours years.

Finding number five is disputed and is given significantly more weight in the decision then is warranted. "The claimant spoke to a co-worker in the break room sometime around 10:00 a.m. and asked this individual, "Would you piss in a bottle for me?" The co-worker was surprised at the request and did not give a response. Approximately 15 minutes later, the claimant open the door to the break room and asked, "Well" to which the co-worker said "No;" meaning that he would not urinate in a bottle for the claimant's benefit." (R. 162).

The Bureau gives an inordinate amount of emphasis to Mr. Gustafson's testimony regarding the drug test. Jesse did not recall an exchange with Gustafson regarding his drug test but if he did make the statements, he made them in jest. Gustafson's actual testimony made it obvious that he didn't take Jesse seriously having experienced a drug test himself.

MR LEMAY: Mr, Gustafson have you ever had to take a drug test?

MR GUSTAFSON: Yes, I have.

MR. LEMAY: Take us through that process, would you?

MR. GUSTAFSON: My supervisor will notify me usually around between 8 and 8:30 that I have a drug test and from and at 9 o'clock I walk over and get the paper work, drive down to the Family Medical Center there. You walk in, do the drug test, walk out, go back to work.

MR. LEMAY: Okay. Now, tell me specifically, when you get to the drug testing site, what happens there?

MR. GUSTAFSON: When you get to the site, you are told to wait in a waiting room and then they'll call your name. They take you into a room, you take everything out of your pockets, you take your jacket off, hat, gloves, wallet, coins in your pockets, everything that you have, you put it in a locker and you lock it and put the key in your pocket. Then they give you a cup and you go into the bathroom which the bathroom is a secured area, there's no running water, other than the bathroom stool and sink with no water and you go to the bathroom and then you take the sample back out and give it to the lady and she's, puts it on the counter, she puts her paperwork, does it all, you initial it, she puts stickers on the sample that you took, you initial those and then you are told to leave.

MR. LEMAY: So, with that description, how likely is it that you could piss in a cup for somebody else?

MR. GUSTAFSON: That's what I've always thought, but I kind of wondered how it's ever done, but I know, you know.....

MR. LEMAY: Okay. So.....

MR. GUSTAFSON: I couldn't possibly do it.

Emphasis Added. (R. 92-93).

MR. LEMAY: So, what, you heard Mr. Gustafson say that you indicated that you wanted him to piss in a cup for you.

MR. HOFFNER: I don't recall and if I did, it would have been in a joking manner, cuz there's no way you can get away with that.

Emphasis Added. (R. 99).

In weighing Gustafson's testimony, the Bureau must consider that he was still employed with Continental Metal Products. Given the testimony of previous lay offs, Gustafson had an interest in supporting his employer in any way that would benefit his employer and himself. He had an interest in pleasing his employer. Clearly, Gustafson's testimony was meant to paint Jesse in a less than desirable light. Gustafson's testimony is not relevant to whether Jesse violated a known company policy or not and should be given no weight for the determination of whether Jesse's conduct was misconduct.

What is relevant concerning the drug test testimony is the total avoidance of Continental Metal Products' management to admit that Jesse had just taken a drug test in December 2008.

MR. LEMAY : You did take a drug test in December of 2008?

MR. HOFFNER: Yes, Sir.

MR. LEMAY: Do you remember when you took that?

MR. HOFFNER: Possibly a week before Christmas.

MR. LEMAY: And test of course was negative.

MR. HOFFNER: Yes, sir.

MR. LEMAY: How long before that period had you taken any drug tests?

MR. HOFFNER: I don't recall, it had been a few years.

(R. 95). How could an employer who only requires possibly one employee a quarter to take a drug test forget that Jesse just took the last drug test. Dan Green the yard supervisor and Jesse's supervisor was less than candid in testifying regarding Jesse's December drug test:

MR. LEMAY: Mr. Green, were you aware of Jesse taking a drug test in late December?

MR. GREEN: I can't remember, I don't remember who took that test in December, no.

MR. LEMAY: How many drug tests do your drivers take a month?

MR. GREEN: I believe someone gets drawn every quarter.

MR. LEMAY: Just one person?

MR. GREEN: I believe in the consortium they just draw names out and we might have one guy drawn or we may have all the guys drawn, whoever is in the consortium, it's not just whoever in our yard.

MR. LEMAY: That's the random?

MR. GREEN: Yes.

MR. LEMAY: Is there another way that somebody can come up for a drug test?

MR. GREEN: Not that I'm aware of.

MR. LEMAY: Isn't that odd that he was drawn for a drug test in December and then again in January?

MR. GREEN: I, I, ...

MR. HANKLA: Objection, it might call for speculation, if he knows, he should testify to that you should move to, ... , . . . , ... , . . . , ...,

MR. GREEN: I don't know if he's drawn in December and I don't know, I don't know what the rules are, I don't have any part of that

MR. LEMAY: Okay, let me make it clear, now, I mean, if one of your, the people you supervise is going to go for a drug test, you would be notified, correct?

MR. GREEN: I was notified to notify him, yes.

MR. LEMAY: And, that's the typical protocol?

MR. GREEN: Yes.

MR. LEMAY: You just don't recall whether he was tested in December or not

MR. GREEN: No, I couldn't, nope I couldn't tell you if he was or not.

(R. 82-83). Sue Meyer who apparently is responsible for notifying supervisors could not recall that Jesse had just taken a drug test in December either:

MR. LEMAY: Just a couple. Ms, Meyer, when was Jesse's last drug test?

MS. MEYER: I don't recall.

MR, LEMAY: Isn't it true he had a drug test the end of December, 2008?

MS. MEYER: I don't remember it, it's possible he was gone for a random.

MR. LEMAY: Don't you have some records right there that you could look at?

MS. MEYER: I don't have them with me, no, we're at the Attorney's office.

MR. LEMAY : You seem to have a reference to when he was employed, I mean, wouldn't you have the drug test records with you?

(UNIDENTIFIABLE): Objection, I guess she answered the question, she does not have them.

MR, LEMAY: Has Jesse ever had a positive drug test since he's come back in 2003?

MS. MEYER: No.

(R. 62).

While it is important to evaluate the conduct of the employee in determining "misconduct," one cannot ignore the conduct of the employer. In the present case, the employer had total control and discretion over when the drug test was completed. Continental Metal Products' conduct in failing to exercise its discretion in rescheduling the drug test cannot be ignored.

MS. MEYER: Well, I came to work and I had had a drug test scheduled for Friday, the previous Friday [January 9th], but it was storming, so Monday I came to work and called to see if they could get him in on Monday. I called Dan Green and said, is Jesse at work today and he said yes, so, I made the appointment then I called Jesse in the break room. . . . .

(R. 48).

In finding number six, the Bureau gave emphasis to the driving conditions in Minot and found fault with Jesse for not driving to the drug test. However, the employer did not deny the existence of a no travel advisory in the city of Minot. Actually, Mr. Green gave testimony that they didn't have enough work because of the road conditions.

> MR. HANKLA: Okay, now, can you explain to us what you recall of your interactions with Mr. Hoffner the morning of the 12th?
>
> MR. GREEN: It was cold and stormy that day and **we didn't have any truck driving for him** to do, so he was going to run one of the excavators, but the excavator that we had, the heater wasn't working very good, so it was probably cold in the machine and he came and asked me if he could leave at Noon, cuz we didn't have anything for him to do.

Emphasis Added. (R. 76).

"The yard supervisor, however, left the premises a short time later to travel to his home for personal reasons; thus, showing that travel within the city limits was possible." (R. 162). At best, Continental Metal Products' conduct in relation to the storm on January 12, 2009 is inconsistent. Certainly, a deed may be possible but still not advisable. It is extremely unfair to enforce one safety regulation created by the Department of Transportation (DOT) but at the same time ignore other safety warnings. Continental Metal Products could have rescheduled the drug test for Tuesday.

Obviously, the weather and road conditions were bad enough that Continental Metal Products was not going to put any of their trucks on the road. But it is ok to place an employee in danger because the employer was able to drive on the streets. Jesse was being placed in

danger by being required to travel on the road. A check with the Minot Police Department Central Dispatch's public record will show that thirteen accidents took place on January 12, 2009. Again how can the employer decide not to have a drug test completed on Friday and not be able to postpone the test until a later date.

The Bureau's findings seven, nine and eleven all refer to a policy, a DOT policy. There seems to be a great lack of clarity as to what policy was the "known company policy." Job Services' early documents sent to Continental Metal Products requests information from the employer regarding a violated company policy and even requires the employer to provide Job Service with a copy. (R. 5). The Job Service form was signed by the general manager but no copy of a policy was provided. So when Jesse was denied unemployment compensation benefits, he was denied for violating a known company policy that had yet to be provided to Job Service or Jesse. (R. 16).

Another Job Service form did include a statement from Continental Metal Products general manager:

> Employer Statement
> He had a positive drug about 6 years ago. Policy?
> If It Is twice, It Is grounds for dismissal. DOT rules
> also state he can not drive If does not take the test.
> The claimant was called by Sue, told he had about
> 1/2 an hour to get to the test. Del said he would go pick
> up the kit. Went In to speak to Del, GM and told him
> that he did not want to drive In the weather. Del states
> he offered to drive the claimant himself to It. The
> claimant then responded that he would drive himself.
> Then he left.

(R. 10). While the statement is inaccurate as to Jesse's last positive drug test, which was fourteen years ago, it did provide a basic understanding that two positive drug tests can result in a termination. Continental Metal Products did not show a policy that would allow their company to use a positive drug test from fourteen years prior and from an entirely separate period of employment.

Mr. Gustafson had his understanding of the drug policy:

> MR. LEMAY: I guess you heard some of the testimony here that if you get two positives, that's the basis for termination, is that how you've always understood the policy?
>
> MR. GUSTAFSON: Yeah, when I took my driver's test, I knew that's what the policy was and that's been 18 years ago.

(R. 93).

It was not until March 17, 2009, that Job Service first received an actual copy of a policy even though it had been requested in February. (R. 5).

Jesse did not recall receiving a copy of the Alcohol and Drug Policy but did recall signing a two page document wherein two failed tests could result in a termination. (R. 98). It appears that Continental Metal Products may be using a statement that was signed as a part of the Employee Assistance Program to deny Jesse unemployment benefits.

> MR. HANKLA: Okay, now I am also going to turn to the Continental Metal Products Employee Assistance Plan which is Page 4 of Exhibit 7. Is that a true and correct copy of the Employee Assistance Plan?
>
> MS. MEYER: Yes.

MR. HANKLA: Was this a document that was given to the employees of Continental Metal Products?

MS. MEYER: Just truck drivers.

MR HANKLA: Just truck drivers and did you give this document to Jesse?

MS. MEYER: Yes.

MR. HANKLA: Page 5 of that, is that a continuation of the Plan?

MS. MEYER: No, that's just a form that I have them fill out also to say that they know the drug and alcohol policy.

MR HANKLA: So, as far as you were aware, Jesse was fully versed and had been supplied with copies of Continental Metal Products Anti-Drug and Alcohol Plans as well as the Assistance Policy?

MS. MEYER: Yes.

Jesse's testimony regarding his awareness and understanding of the policy followed Ms. Meyer's testimony:

MR. HANKLA: And, you acknowledge receiving that one. Now, the signature on page 5, Employee Assistance Program, oh, okay, that's an attendance acknowledgment, I'll skip that one. Go to 6. I, Jesse Hoffner have been given a copy of General Scrap Inc.'s Drug and Alcohol Plan. I have read the plan and I understood it. There is a signature on there for a Jesse A. Hoffner, is that you?

MR. HOFFNER: Let me find it here first, Sir, please.

MR. HANKLA: Sure.

MR. LEMAY: We had one page of that Exhibit that apparently got mixed up with the other stuff, but, ...

MR. HANKLA: I think, Richard, I think on the top kind of left there's almost like a signature blank, it says General Scrap Inc. AlO Continental Metal Products and Dakota Pipe and Steel, can you find that one? I'm sorry, Mr. LeMay, I didn't mean, I'm sorry.

MR. LEMAY: So, that's the General Scrap Incorporated Continental Metal Products and Dakota Pipe and Steel?

MR. HANKLA: Yes.

MR. LEMAY: It's signed 6-10-03?

MR. HANKLA: Correct.

MR. LEMAY: Okay. We have that.

MR. HANKLA: Mr. Hoffner, is that your signature?

MR. HOFFNER: Yes, Sir.

MR. HANKLA: Okay, so that would indicate that you did in fact receive the Drug and Alcohol Plan?

MR. HOFFNER: Not the Continental Metal Plan, no, Sir, I was given a General Scrap Incorporated Plan.

(R. 105-106).

Jesse's did have an understanding of what he thought the drug policy was whether he was shown a policy or not.

MR. LEMAY: It was your understanding though that if you had two positive tests then that would be a basis for termination?

MR HOFFNER: Yes, Sir.

MR LEMAY: The Exhibit 8, what's referred to as the Anti-Drug and Alcohol Plan for Continental Metal Products, had you ever seen that document before?

MR. HOFFNER: If I have I don't recall, Sir.

MR LEMAY: What do you recall seeing and signing?

MR. HOFFNER: I signed like a two-paged document stating in it, involved all employees, not just the truck drivers. It was a General Scrap Incorporated plan.

MR. LEMAY: But, that plan did say two _____. [two positive tests would be a basis for termination.]

MR HOFFNER: Yes, Sir.

(R. 98).

In reviewing the employer's manual it is not clear which section the employer is alleging that Jesse violated. (R. 147-160). There is both testimony regarding a random test and a reasonable suspicion test.

MR. HANKLA: Now are there, what are the, the policy as you submitted in the Exhibit, which would be Exhibit, Exhibit 7, Page 4, Part F, states what?

MS. MEYER: Any employee that has a second positive test result within the random testing of our consortium shall be terminated.

(R. 52).

MR. SCHNASE: How was that, how are the names decided?

MS, MEYER: Well, we would normally get a list from our consortium, this was a reasonable suspicion, so it was only Jesse that was, and we set up an appointment for.

MR. SCHNASE: What was reasonable suspicion based on?

MS. MEYER: His behavior and he'd had some weight loss we were questioning.

MR. SCHNASE: Was Mr. Hoffner made aware at all on Friday that he had been selected for this random test?

MS. MEYER: No.

(R. 59).

Clearly everyone, the general manager, the office manager, the yard supervisor, a co-truck driver and Jesse, had some idea that two failed drug tests would result in a termination. The evidence most critical to Jesse's case is whether there is a time frame in which two positive drug test would result in a termination. Jesse's first failed drug test happened during his first period of employment. The second missed drug test was fourteen years later in 2009, during his second period of employment.

MR. LEMAY: When did you first go to work for Continental Products?

MR. HOFFNER: 1995.

MR. LEMAY: And, you worked for them until when?

MR. HOFFNER: Approximately, July of 1998.

(R. 93).

MR. LEMAY: Did you have any reason to believe that a positive drug test in 1995 would adversely affect you after your reemployment in 2003?

MR. HOFFNER: No, Sir, I thought that would be irrelevant.

MR. LEMAY: Did anybody ever tell you that you had one strike against you and. . .. . .

MR. HOFFNER: No, Sir.

(R. 97).

No evidence was presented by the employer as to how long a negative drug test or refused drug test would be on the employee's record. No witness of the employer testified to facts concerning the duration of a negative drug test or refused drug test. Continental Metal Products' manual refers to how long to keep documentation of drug tests. One might think, a time to maintain documentation of a drug test would be associated with the use of the test results for disciplinary or termination purposes.

The employer's manual provides information on documentation under several sections of the manual: Random Testing; Post Accident Testing; Reasonable Suspicion Testing; and, Return to Duty Testing. Under all sections, the period for maintaining documentation of a drug test is the same. Positive drug test results are kept five years; negative drug test results are kept one year. (R. 190, 192-194).

In summary, the evidence of the record does not support the Bureau's findings. Public policy requires that any ambiguity or lack of clarity in the facts must be interpreted in favor of the claimant. While it is not absolutely clear whether Continental Metal Products was relying upon a random test or a reasonable suspicion test, neither was truly violated. Being no written

policy to the contrary, five years seems a reasonable time for which a positive drug test can be used against an employee of Continental Metal Products. Neither the Bureau nor the employer have provided legal authority that would allow a drug test to be used against Jesse for longer than the five year period.

II. Jesse Hoffner's behavior does not constitute misconduct.

Jesse Hoffner allegedly violated a known company policy by failing to complete a drug test. The policy allows for a termination on the second positive drug test. A failure to take a drug test is considered a positive test. Jesse had a positive drug test when he worked for Continental Metal Products, then known as General Scrap, during his first period of employment fourteen years ago. The employer considered Jesse's failure to take a drug test on January 12, 2009, as his second positive drug test and terminated his employment. Now Continental Metal Products wants Job Service North Dakota to deny Jesse unemployment compensation benefits because they feel his behavior is "Misconduct." Job Service agreed and Jesse was denied benefits.

It is established in North Dakota that "misconduct," as used under N.D.Cent.Code. § 52-06-02(2), to disqualify an individual from receiving unemployment compensation benefits:

> ... is limited to conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or 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 his 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.

Perske v. Job Service North Dakota, 336 N.W.2d 146, 148-49 (N.D. 1983).

This broad definition of misconduct invites abuse of its application by employers seeking to avoid payment of unemployment compensation when terminating employees without just cause. Conceivably, conduct in "disregard of the employer's interest" could include all types of behavior.

In order to disqualify a claimant from benefits. the basis for the discharge must be "reasonable," considered not in reference to the business interest of the employer, but with reference to the statutory purpose. See Williams v. District Unemployment Compensation Bd., 383 A2d 345, 349 (D.C.1978). In the present case, Continental Metal Products has a potential charge against their unemployment compensation account. Continental Metal Products has a substantial business interest in alleging misconduct.

Whenever one is confronted with an unemployment compensation appeal, it is important to keep in mind the purpose of the program and for whom it was intended to benefit. North Dakota has a declaration of public policy statute at N.D.Cent.Code §52-01-05, which states:

> Involuntary unemployment creates a hardship on the unemployed worker and her family and leads to a state of economic insecurity. Relief from problems of involuntary unemployment imposes a statewide burden of serious consequence to the people of the state of North Dakota which can best be met by unemployment insurance for the working man who becomes unemployed through no fault of his own...

Newland v. Job Service North Dakota, 460 N.W.2d 118, 121 (N.D.1990).

N.D.Cent.Code § 28-32-19 governs the scope of administrative agency decisions. N.D.Cent.Code § 52-01-05 and § 52-06-02 guide the review of Job Service decisions:

> ...the Legislature, in enunciating a public policy to provide unemployment compensation, intended to strike a balance between the rights of the unemployed worker who genuinely wants to work, contained in Section 52-01-05, [**6] and the protection of the former employer from quits that have nothing to do with the employer or the employment, furthered by Section 52-06-02. Job Service, in determining eligibility for compensation, must be attuned to that balance, and so must we. However, because unemployment compensation laws are remedial legislation, the balance should be struck in favor of the employee.

Newland, supra at 121.

The test of whether conduct of an employee is misconduct justifying discharge is volitional; conduct may be harmful to employer's interest and justify discharge, but it evokes disqualification for unemployment compensation benefits only if it is willful, wanton, or equally culpable. Jacobs v. California Unemployment Ins. Appeals Board, 25 Cal. App.3d 1035 (3rd Dist.1972).

The North Dakota Supreme Court in Marion established that an employer's policy need not be explicit and in writing for an employee's actions to constitute misconduct if the employee knew or should have known that the conduct involved was inappropriate, and the employee's "action evinced an intentional and substantial disregard of the standard of behavior

which his employer had the right to expect from him." Marion v. Job Service North Dakota, 470 N.W.2d 609, 612 (N.D.1991).

No evidence was presented by the employer as to how long a negative drug test or refused drug test would be on the employee's record. No witness of the employer testified to facts concerning the duration of a negative drug test or refused drug test. Continental Metal Products' manual does not clearly state how long a positive drug test remains on an employee's record, it only refers to how long to keep documentation. One might think, a time to maintain documentation would be associated with the use of the test results for disciplinary or termination purposes.

Jesse was required to sign an employee assistance program form in 2003. No additional warning or training was evidenced. Nothing in what Jesse signed in 2003 alerted him to the fact that Continental Metal Products' intended to use his previous positive drug test against him in the future.

The employer's manual provides information on documentation under several sections of the manual: Random Testing; Post Accident Testing; Reasonable Suspicion Testing; and, Return to Duty Testing. Under all sections, the period for maintaining documentation is the same. Positive test results are kept five years; negative test results are kept one year. (R. 190, 192-194). Even if Jesse would have been given a copy of the manual where would he have read that a fourteen year old test would be used against him.

It is unreasonable for an employee to expect that a rehire would bring with it any of the employee's previous employment transgressions. If the employer's policy intends to carry

forward previous employment transgressions then the policy must clearly state such and the employee must receive some type of notice or warning.

Given Continental Metal Products' policy it would be contrary to North Dakota case law and public policy to allow the previous employment drug test to be used to deny Jesse unemployment compensation benefits fourteen years after the fact. At most, Jesse's failure to comply with the employer's request to complete the drug test was reasonable given the no travel advisory. For all intents and purposes Jesse was a good employee:

> MR. LEMAY: Have you ever had any, I mean, what kind of employee is he?
>
> MR. GREEN: He was a good employee.
>
> MR. LEMAY: And, you've been his direct supervisor for some time?
>
> MR. GREEN: Yes, Sir.
>
> MR. LEMAY: Probably ever since he was working at Continental Products for the second time in 2003?
>
> MR. GREEN: Yes, Sir.
>
> MR. LEMAY: Has he ever given you any reason to doubt his statements before?
>
> MR. GREEN: No, Sir.

(R. 81).

Even if you accept the employer's argument that it was safe to drive the streets of Minot, in spite of a "No Travel Warning," Jesse's decision not to drive, at most, would be an isolated episode of poor judgment. Jesse's judgment was also influenced by his health. (R. 170). The letter from Jesse's treating physician corroborates his health concerns. Id.

Certainly, Jesse's conduct cannot be construed as willful, wanton, disregard of his employer's interest.

Prior cases have established that an isolated episode of poor judgment constitutes disqualifying misconduct only if the facts and circumstances of the case require it. Hulse v. Job Service North Dakota, 492 N.W.2d 604 (N.D.1992)(inadvertent sotto voce utterance of expletive not disqualifying misconduct); Hins v. Lucas Western, 484 N.W.2d 491 (N.D.1992)(Physical altercation with co-worker isolated incident not disqualifying misconduct); Blueshield v. Job Service North Dakota, 392 N.W.2d 70 (N.D.1986)(Single isolated incident of physical force disqualifying misconduct); Schadler v. Job Service North Dakota, 361 N.W. 2d 254 (N.D.1985)(single unexcused absence disqualifying misconduct).

In Hulse, the court reviewed the employee's conduct against four criteria of culpability specified in the definition of misconduct. Hulse, supra at 608. In Jesse's case it would require a review of whether his alleged conduct (1) was made in willful or wanton disregard of Continental Metal Products' interest; or (2) was so carelessly or negligently made that it amounts to willful or wanton disregard of Continental Metal Products' interest; or (3) was made with wrongful intent or evil design; or (4) shows that Jesse intentionally and substantially disregarded Continental Metal Products' interest or his own duties and obligations. Id.

Wrongful intent can be inferred from, "A recurrent pattern of negligent acts, so serious as to amount to gross negligence." McGraw-Edison Co. v. Dept. of Industry, Lab. & Hum. Rel., 221 N.W.2d 677, 682 (Wis.1974).

In the present case there is only one alleged failure to comply with the employer's request for Jesse to take a drug test. The employer testified to receiving the request for random

test on the previous Friday but due to the weather exercised discretion to wait until the following Monday. The employer's ability to exercise discretion must be weighed with Jesse's failure to travel to the drug test given the no travel advisory. Certainly, one incident does not show a recurrent pattern of negligent acts.

Prior cases have also established that recurring acts of negligence or carelessness may constitute disqualifying misconduct. Medcenter One v. Job Service North Dakota, 410 N.W.2d 521 (N.D.1987); Skjefte v. Job Service North Dakota, 392 N.W.2d 815 (N.D.1986).

In Medcenter One a nurse repeatedly engaged in visiting with co-workers and patients regarding her personal problems. The employee, despite being warned verbally and in writing, continued visiting and was discharged. The court decided that "what may have begun as a good faith error in judgment degenerated into willful disregard of Medcenter One's interest or, at least, carelessness or negligence of such degree or recurrence to manifest equal culpability. Medcenter One, supra at 525.

In Skjefte an employee allowed family members to call her at work on her employer's toll-free number. The employee was warned verbally and in writing that such conduct was not acceptable and that further calls would result in her termination. The employee accepted another toll-free call and was discharged. The court held that the "recurrence of that conduct would ... be carelessness or negligence of such degree or 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 his employer." Skjefte, supra at 819.

Both employees in Medcenter One and Skjefte admitted to the conduct under scrutiny. Jesse on-the-other-hand denies Continental Metal Products' allegations and asserts that he made the employer aware that he did not feel good prior to being notified of having to take a drug test. Additionally, Jesse brought the "No Travel Advisory" to the employers attention.

In the very case that North Dakota bases its definition of misconduct, Boyton v. Neubeck,, the employee failed to report two minor traffic accidents in violation of a company rule, yet received unemployment benefits. Boynton Cab Co. v. Neubeck. 296 N.W. 636 (1941).

The issue is not whether Continental Metal Products can terminate Jesse's employment. The issue is whether Jesse's conduct meets the definition of misconduct. "Not every act for which an employee may be dismissed from work will provide a basis for disqualification from unemployment compensation benefits because of misconduct." Jadallah v. District of Columbia Department of Employment Services, 476 A.2d 671 (D.C.1984), (citing Hawkins v. District Unemployment Compensation Board, 381 A.2d 619, 622 (D.C.1984)).

Cases addressing the issue of misconduct in other jurisdictions have established certain principles. The vast majority of state statutes place the burden on the employer to prove not only that the employee is guilty of misconduct, but was also warned or put on notice of the impropriety. A majority of jurisdictions also require the employer to show by clear and convincing evidence that the employee is actually guilty of the alleged misconduct. See Renita R. Johnson, Project: Special Project on Workers' Compensation in the District of Columbia Court of Appeals: Unemployment Compensation: Disqualification for "Misconduct," 30 How.L.J. 637, 644 (1987).

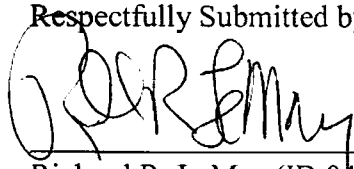
The Bureau's conclusions are unreasonable. Based upon a reasoning mind. Continental Metal Products did not meet its burden of proof nor its burden of persuasion by the greater weight of the evidence. Continental Metal Products has the burden to prove: 1) the existence of the employee rule or policy; 2) the facts of its violation; and, 3) the employee's behavior is not justifiable or reasonable. Continental Metal Products failed to prove the facts of the violation and that Jesse's behavior was not justifiable or reasonable.

CONCLUSION

Continental Metal Products chose to discharge Jesse from his job and now has the burden to prove disqualifying misconduct, and it has not met that burden. It is respectfully submitted that the agency's findings of fact are not supported by the weight of the evidence, the findings do not support the conclusions of law and that Jesse Hoffner is not guilty of "misconduct." The decision of the agency should be reversed and Jesse Hoffner should be found eligible for unemployment compensation benefits.

Dated this 15th day of January, 2010.

Respectfully Submitted by:



Richard R. LeMay (ID 04665)
Attorney for the Appellant
Legal Services of ND
PO Box 1666
Minot, ND 58702-1666
Phone: (701) 852-4369 Ext 204

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that a true and correct copy of the above and foregoing Brief in Support of Petition for Judicial Review was mailed in the United States Mail at Minot, North Dakota on the 15th day of January, 2010, to the following persons:

Michael T. Pitcher
Assistant Attorney General
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509

Peter B. Hankla
Attorney at Law
PO Box 998
Minot ND 58702-0998

Dated this 15th day of January, 2010.

LEGAL SERVICES OF ND
By: Richard R. LeMay