IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JAMES P HARRINGTON
Claimant

SCHENKER LOGISTICS INC
Employer

APPEAL NO. 10A-UI-02426-CT

ADMINISTRATIVE LAW JUDGE DECISION

Original Claim: 01/17/10
Claimant: Respondent (1)

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Schenker Logistics, Inc. filed an appeal from a representative's decision dated February 5, 2010, reference 01, which held that no disqualification would be imposed regarding James Harrington's separation from employment. After due notice was issued, a hearing was held by telephone on March 30, 2010. Mr. Harrington participated personally. The employer participated by Nicki Brick, Human Resources Generalist, and John Budnick, DO. The employer was represented by Tom Kuiper of Talx Corporation. Exhibits One through four were admitted on the employers' behalf.

ISSUE:

At issue in this matter is whether Mr. Harrington was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Harrington began working for Schenker Logistics, Inc. on April 9, 2007 and was last employed full-time as a case pick operator. He was discharged for violating the employer's drug policy. On December 7, 2009, he was randomly selected for drug testing. A third party entity is responsible for selecting individuals to be tested using a random number generator. All active employees are in the pool of individuals from which test subjects are selected.

The drug screen results were received on December 14. Mr. Harrington tested positive for marijuana. On December 16, the employer mailed him a letter by certified mail, return receipt requested, advising of the positive test results and the fact that his employment was terminated. The letter advised Mr. Harrington that he could have a split of his original specimen tested at a lab of his choice at his expense. The letter does not advise of the costs of such testing. The letter advised that he had to notify the employer within five working days if he wanted to have the split tested. Mr. Harrington did not request testing of the split specimen. The positive drug test was the sole reason for his discharge.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Mr. Harrington was discharged for violating the employer's drug and alcohol policy when he tested positive for marijuana. In order for drug testing results to form the basis of a misconduct disqualification, the testing must be conducted in conformance with Iowa's drug testing laws. See Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553 (Iowa 1999). This requirement applies to not only the testing itself, but also to post-testing procedures. See Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003).

An employer is required to notify an individual by certified mail, return receipt requested, of positive drug test results. Iowa Code section 730.5(7)i(1). Although the employer sent notice to Mr. Harrington by certified mail, return receipt requested, the notice was flawed in at least two material respects. The notice did not advise him of the cost of having a split tested as required by section 730.5(7)i(1). The purpose of the statute is to provide the employee with sufficient information to make an informed choice regarding further testing. Mr. Harrington was not required to ask about the costs; the employer was required to notify him of the costs.

The law also requires that the notice sent to the employee advise him of the time frame by which he has to decide about further testing. The statute requires that he be given seven days. The letter to Mr. Harrington advised that he had to notify the employer within five working days. The term "working days," forces an employee to determine whether the reference is to days the employer is in operation or to Monday through Friday. An individual cannot operate in his own best interest if there is confusion as to when his time for action expires. Because the employer did not fully and substantially comply with the post-testing requirements of Iowa's drug testing law, the results cannot be used to disqualify Mr. Harrington from receiving benefits.

DECISION:

The representative's decision dated February 5, 2010, reference 01, is hereby affirmed. Mr. Harrington was discharged, but disqualifying misconduct has not been established. Benefits are allowed, provided he is otherwise eligible.

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Carolyn F. Coleman
Administrative Law Judge

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Decision Dated and Mailed

cfc/kjw