

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DUWAYNE L DEAN**

Claimant

**APPEAL NO. 10A-UI-05219-MT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TYSON FRESH MEATS**

Employer

**Original Claim: 11/29/09**

**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

Section 96.6-2 – Timeliness of Appeal

**STATEMENT OF THE CASE:**

Claimant filed an appeal from a decision of a representative dated December 31, 2009, reference 03, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on May 26, 2010. Claimant participated personally. Employer participated by Deb Garnand, Human Resource Manager. Exhibit One was admitted into evidence.

**ISSUES:**

Whether claimant was discharged for misconduct.

Whether the appeal is timely.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on November 24, 2009.

Claimant was discharged on November 24, 2009 by employer because claimant refused to take a drug screen after an alleged compensable work injury. Employer later denied that the injury was work-related. Claimant was informed at the time of hire that he would face discharge for refusing to take a drug test. Employer tests for drugs after compensable injuries pursuant to policy. Claimant was granted three hours to pass a urine sample. Claimant was given 40 ounces of water during that time. Claimant, notwithstanding the time and water, still did not pass a urine.

Claimant did not receive a copy of the adverse decision. Claimant appealed promptly upon getting notice of the adverse decision. Claimant was previously advised he could not get unemployment because he was off work due to injury.

## REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

871 IAC 24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Code section 96.6-2 provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The gravity of the incident, number of policy violations, and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

In this matter, the evidence established that claimant was not discharged for an act of misconduct when claimant violated employer's policy concerning drug testing. Claimant was warned concerning this policy.

The last incident, which brought about the discharge, fails to constitute misconduct because there is no proof of a work-related injury. Iowa Code section 730.5 allows drug testing of an employee if, among other conditions, the employer has "probable cause to believe that an employee's faculties are impaired on the job." Iowa Code section 730.5(8) sets forth the circumstances under which an employer may test employees for the presence of drugs. The testing was done as a result of claimant allegedly being involved in an accident at work. See Iowa Code section 730.5(8)f. Since employer denied that a compensable injury occurred, the request for a urine sample was in violation of policy. This is not an intentional policy violation, as employer had no right to test claimant based on employer's denial of a work related accident. The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

Claimant's appeal was timely as he did not receive a copy of the December 31, 2009 decision in the mail. Claimant appealed promptly upon notice of the adverse decision.

**DECISION:**

The decision of the representative dated December 31, 2009, reference 03, is reversed. Unemployment insurance benefits shall be allowed, provided claimant is otherwise eligible. Claimant's appeal is timely.

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Marlon Mormann  
Administrative Law Judge

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Decision Dated and Mailed

mdm/kjw