

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TERRY G JELKEN**  
Claimant

**APPEAL NO. 09A-UI-04553-SWT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TYSON FRESH MEATS INC**  
Employer

**OC: 02/15/09**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

The employer appealed an unemployment insurance decision dated March 11, 2009, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on April 17, 2009. The parties were properly notified about the hearing. The claimant failed to participate in the hearing. Lonnie Jepsen participated in the hearing on behalf of the employer with a witness, Rose Bumsted. Exhibit One, consisting of the employer's drug and alcohol testing policy, was sent in after the hearing and is admitted into evidence.

**ISSUE:**

Was the claimant discharged for work-connected misconduct?

**FINDINGS OF FACT:**

The claimant worked full time as a maintenance worker for the employer from December 17, 2007, to July 5, 2008. He was informed and understood that under the employer's work rules, employees were required to submit to a drug test under certain circumstances—including when employees (1) have a compensable injury requiring outside medical treatment in accordance with applicable law or (2) cause an accident involving another employee. The rules provide for termination as an option for employees who test positive for illegal drugs or refuse to submit to testing.

In April 2008, the claimant suffered an injury on the job but nurses in the employer's health services department treated him initially. In July 2008, a decision was made to refer the claimant for outside medical treatment.

On July 5, 2008, the claimant was requested to provide a urine sample for drug testing under the employer's work rule for compensable injuries. The claimant refused to provide a urine sample. The employer discharged the claimant for violating the drug and alcohol testing policy.

## REASONING AND CONCLUSIONS OF LAW:

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

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code section 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not misconduct within the meaning of the statute. 871 IAC 24.32(1).

The Iowa Supreme Court has ruled that an employer cannot establish disqualifying misconduct based on a drug test performed in violation of Iowa's drug testing laws. *Harrison v. Employment Appeal Board*, 659 N.W.2d 581 (Iowa 2003); *Eaton v. Employment Appeal Board*, 602 N.W.2d 553, 558 (Iowa 1999). As the court in *Eaton* stated, "It would be contrary to the spirit of chapter 730 to allow an employer to benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." *Eaton*, 602 N.W.2d at 558.

Iowa Code section 730.5-9-a states that employer can take disciplinary action against an employee including termination of employment, upon receipt of "a confirmed positive test result for drugs or alcohol ... or upon the refusal of an employee ... to provide a testing sample."

Under Iowa Code section 730.5-8, drug or alcohol testing is limited to the following reasons: (1) random testing, (2) drug or alcohol testing after completing of rehabilitation, (3) reasonable suspicion testing, (4) pre-employment, (5) federally required testing, and (6) to investigate accidents in the workplace resulting in an injury to a person reportable under chapter 88 or resulting in damage of over \$1,000. In addition, reasonable suspicion includes evidence that the person caused an accident at work resulting in an injury to a person reportable under chapter 88 or damage of over \$1,000. Iowa Code chapter 88 (Occupational Health and Safety Act) requires the reporting of work-related injuries, other than minor injuries that require only first aid treatment.

The drug test requested of the claimant on July 5, 2009 violates Iowa Code section 730.5-8. The test was not done to investigate what caused the injury three months before. It was not triggered by some reasonable suspicion of drug use. Because the employer was not justified under Iowa law to test the claimant, the refusal to take the drug test does not disqualify the claimant from receiving unemployment insurance benefits.

**DECISION:**

The unemployment insurance decision dated March 11, 2009, reference 01, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Steven A. Wise  
Administrative Law Judge

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Decision Dated and Mailed

saw/pjs