

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TODD A SCHULZE
Claimant

BRANDFX LLC
Employer

APPEAL 23A-UI-10035-PT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 09/24/23
Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The claimant filed an appeal from the unemployment insurance decision dated October 12, 2023, (reference 01) that denied benefits after a separation from employment. After due notice, a telephone hearing was held on November 28, 2023. The claimant participated personally and was represented by Attorney Stuart Cochrane. The employer did not participate. The administrative law judge took official notice of the administrative record.

ISSUES:

Did the employer discharge the claimant for job related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began his employment on August 14, 2022, as a custodian. Claimant worked Monday through Thursday from 6:00 a.m. to 4:30 p.m. Claimant was separated from employment on August 31, 2023, when he was discharged.

Claimant was aware the employer has a drug and alcohol policy, but was unaware of the specifics of the employer's policy. Claimant received a copy of the employer's drug and alcohol policy when he was hired. The employer does not have an employee assistance program nor a resource file that is available to employees containing information about drug and alcohol treatment programs. The employer did not offer a copy of the drug and alcohol policy into evidence.

On August 24, 2023, claimant was wheeling a large dumpster to a trash compactor when the dumpster fell over and hit claimant in the chest. The accident left a large bruise on claimant's upper chest. Claimant reported the accident to the employer and the employer sent claimant to a medical provider for an evaluation. Claimant's x-rays were negative for fractures, but the medical provider prescribed claimant an opioid medication for his pain.

On August 29, 2023, the employer requested that claimant submit to a drug screen. The employer did not tell claimant what drugs would be tested in the drug screen. Claimant complied with the request and submitted to an oral mouth swab test. Claimant does not know whether the human resources representative who collected the saliva specimen participated in training pertaining to

drug and alcohol testing. The human resources representative did not split the sample into two samples at the time of collection in front of claimant.

On August 31, 2023, the employer called claimant into a meeting and informed claimant that his employment was being terminated effective immediately because the drug screen was positive for an illegal substance. The employer never mailed a letter notifying claimant of the test results or that claimant had the right to test any split sample that may have been collected. The employer did not offer a copy of the drug screen results into evidence. Claimant did not have any prior verbal or written warnings for violating the employer's drug and alcohol policy.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from the employment for no disqualifying reason. Benefits are allowed.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and 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.

The employer has the burden of proof in establishing disqualifying job misconduct. *Casper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

Testing under Iowa Code section 730.5(4) allows employers to test employees for drugs and/or alcohol but requires the employer "adhere to the requirements . . . concerning the conduct of such testing and the use and disposition of the results." Iowa Code section 730.5(1)*i* allows drug testing of an employee upon "reasonable suspicion" that an employee's faculties are impaired on the job or on an unannounced random basis. It also allows testing as condition of continued employment or hiring. Iowa Code § 730.5(4).

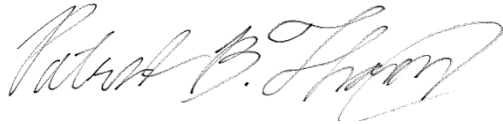
Testing shall include confirmation of initial positive test results. Iowa Code section 730.5(7)(i)(1) mandates certain action after a medical review officer (MRO) reports a positive test result to the employer, upon a confirmed positive drug test by a certified laboratory. After such a positive test report, the employer must notify the employee both of the test results by certified mail return receipt requested, and of the right to obtain a confirmatory or split-sample test before taking disciplinary action against an employee. Iowa Code section 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing.

In *Woods v. Charles Gabus Ford, Inc.*, 942 N.W.2d 7 (Iowa 2021), the Iowa Supreme Court held that the employer's failure to include information regarding the specific cost of a retest in the result letter rendered the employer's compliance with the other requirements of Iowa Law for drug testing insufficient to demonstrate misconduct. The Court went on to say, "Without knowing the cost of a retest, a person does not have a meaningful opportunity to consider whether to undertake a confirmatory test...[The employer] failed to substantially comply with the statute by failing to include the cost of a retest in the letter." *Id.*

The Iowa Supreme Court has held that an employer may not "benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." *Eaton v. Iowa Emp't Appeal Bd.*, 602 N.W.2d 553, 557, 558 (Iowa 1999). While the employer certainly may have been within its rights to test and discharge claimant, the employer failed to collect a split sample of claimant's saliva, it failed to notify him in writing of what his test results consisted of, and it failed to notify him of his opportunity to for a second split sample test as required by Iowa Code section 730.5. Because the employer failed to substantially comply with the statute, the employer cannot use the results of the drug screen as a basis for disqualification from benefits. As such, the separation from employment with this employer is not disqualifying and benefits are allowed, provided claimant is otherwise eligible.

DECISION:

The October 12, 2023, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from the employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.



Patrick B. Thomas
Administrative Law Judge

December 4, 2023
Decision Dated and Mailed

pbt/scn

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Iowa Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. *There is no filing fee to file an appeal with the Employment Appeal Board.*

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may file a petition for judicial review in district court.

2. If you do not file an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at www.iowacourts.gov/efile. *There may be a filing fee to file the petition in District Court.*

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

Iowa Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
En línea: eab.iowa.gov

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal. *No hay tarifa de presentación para presentar una apelación ante la Junta de Apelación de Empleo.*

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si no presenta una apelación de la decisión del juez ante la Junta de Apelación de Empleo dentro de los quince (15) días, la decisión se convierte en una acción final de la agencia y tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días. Puede encontrar información adicional sobre cómo presentar una petición en www.iowacourts.gov/efile. *Puede haber una tarifa de presentación para presentar la petición en el Tribunal de Distrito.*

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.