

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**Appeal Number: 05A-UI-00806-RT
OC: 12-05-04 R: 03
Claimant: Respondent (2)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

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.

**KENNETH D HECK
3831 HART CT NE
CEDAR RAPIDS IA 52402**

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.

YOU MAY REPRESENT yourself in this appeal or you may 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. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

**J P GASWAY
J P GASWAY COMPANY INC
PO BOX 2104
CEDAR RAPIDS IA 52406**

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, J P Gasway, J P Gasway Company, Inc., filed a timely appeal from an unemployment insurance decision dated January 12, 2005, reference 03, allowing unemployment insurance benefits to the claimant, Kenneth D. Heck. After due notice was issued, a telephone hearing was held on February 15, 2005, with the claimant participating. Jon Adams, Controller and Operations Manager, and Scott Gasway, President, participated in the hearing for the employer. Employer's Exhibits One and Two were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development unemployment insurance records for the claimant. This matter was originally scheduled for February 8, 2005 at 10:00 a.m. and rescheduled at the employer's request.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One and Two, the administrative law judge finds: The claimant was employed by the employer, most recently as a full-time shipping and receiving manager for three years, from 1973 or 1974 until he was suspended on December 6, 2004 and then discharged on December 15, 2004. The claimant was discharged for failing and refusing to obtain a drug test required by Department of Transportation rules for a truck driver. The claimant was the shipping and receiving manager for approximately three years. As part of his duties, he was required to occasionally drive a truck off the employer's premises and did so approximately five times in 2004. The claimant was also placed in charge of drug tests required by the Department of Transportation and the employer's drug testing and its policy as shown at Employer's Exhibit Two and in particular at page 5 of that exhibit. In October or November 2003, the claimant was informed that he should obtain a commercial driver's license (CDL) and this was confirmed to him by a letter on or about November 17, 2003 as shown at Employer's Exhibit One. The claimant did not object to obtaining the CDL and in fact on December 20, 2003 obtained a CDL. However, even knowing that he was to get a physical and a urine test the claimant did not do so. Nevertheless, the claimant drove a truck for the employer making deliveries on at least five occasions. In late October 2004 or early November 2004, the employer discovered that three employees, one of which was the claimant, was not on a list of random drug tests to meet Department of Transportation rules. The employer's drug testing policy appears at Employer's Exhibit Two. C. J. Cooper & Associates does the drug testing for the employer. The claimant was in charge of implementing the employer's drug and alcohol policy. That policy requires that all applicants and individuals employed by the employer are subject to the policy and must take drug and alcohol tests. The policy further prohibits a refusal to be tested for drugs and alcohol and provides that a violation will be subject to disciplinary action up to and including discharge.

In the first half of November 2004, the employer's witness, Jon Adams, Controller and Operations Manager, informed the claimant that he was not on their random drug test with C. J. Cooper & Associates and he needed to be put on that random drug test list. The employer was informed by C. J. Cooper & Associates, and the claimant was aware, that before he could get on the list he had to take a urine test and a physical. However, the claimant did not immediately schedule a urine test and/or a physical. The claimant merely responded that he would take care of it. The claimant was then asked weekly thereafter about his physical and urine test and getting on the random drug test list but the claimant kept informing the employer that he had no time and that he would do so. On November 29 and 30, 2004 and December 1, 2004, the claimant was specifically asked by Mr. Adams if he had taken the test and the physical, and the claimant responded no. On December 2, 2004, Mr. Adams again asked the claimant specifically about the test and the claimant said he had not taken it. The claimant was told to get it done that day. The claimant did not. The claimant even scheduled a drug test for a new hire in November of 2004 but did not schedule himself. Finally on December 3, 2004, the claimant called C.J. Cooper & Associates and made an appointment for him to take the physical and drug test on December 8, 2004. This telephone call took at most five minutes. Later that day, the claimant was asked yet a fifth time in that week by Mr. Adams if he had taken a drug test and the claimant said no. The claimant indicated that he did not feel he was a driver and was not subject to the test. The claimant did not inform Mr. Adams that he had scheduled a drug test. At that time, the claimant was told that if he did not have the drug test to not to come to work on Monday. The claimant then punched out early and left work.

On December 6, 2004, when the claimant arrived at work, he met with Mr. Adams and the employer's other witness Scott Gasway, President. The claimant was again asked if he had

taken the drug test or urine test and the claimant said no. The claimant did not tell them that he had a drug test scheduled for December 8, 2004. The claimant asked if he was going to take a drug test and he said no because he did not believe it was part of his job. The claimant was then suspended. On December 8, 2004, C. J. & Associates notified the employer that the claimant had scheduled a drug test for that day but had failed to come in for the drug test and had not taken the drug test. The employer consulted its attorney and then called the claimant in on December 15, 2004 and again asked the claimant if he had taken a drug test. When the claimant said no, the claimant was given the option of resigning or being discharged. The claimant chose to be discharged and he was discharged. The claimant was discharged for failing and refusing to take a drug test.

Pursuant to his claim for unemployment insurance benefits filed effective December 5, 2004, the claimant has received unemployment insurance benefits in the amount of \$3,100.00 as follows: \$310.00 per week for 10 weeks from benefit week ending December 11, 2004 to benefit week ending February 12, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(9) provides:

(9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

The parties agree, the administrative law judge concludes, that the claimant was suspended on December 6, 2004 and then discharged on December 15, 2004. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged and the issue of misconduct must be resolved.

In order to be disqualified to receive unemployment insurance benefits pursuant to a disciplinary suspension or a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The first issue presented in this appeal is whether the claimant is actually subject to federal Department of Transportation drug testing requirements. The administrative law judge concludes that he is. The claimant conceded at the hearing that he was subject to those drug testing requirements but during the time in which the claimant failed or refused to get a drug test, he contested that issue with the employer. 49 U. S. C. 31306 provides that the secretary of transportation shall prescribe regulations establishing a program requiring motor carriers to conduct pre-employment, reasonable suspicion, random, and post accident testing of operators of commercial motor vehicles for the use of a controlled substance and the use of alcohol. 49 C. F. R. 382.301 – 382.307 requires such tests providing that an employer shall require a “driver” to submit to such tests. A “driver” is defined as any person who operates a commercial motor vehicle including but not limited to among others, intermittent or occasional drivers. 49 C. F. R. 382.107. The administrative law judge concludes that at the very least the claimant here was an intermittent or occasional driver and is subject to the Department of Transportation rules requiring drug tests.

The issue then becomes whether the claimant failed or refused to take a required drug test pursuant to Department of Transportation rules and the employer's drug and alcohol policy. The administrative law judge concludes that he did. The series of events culminating with the claimant's discharge appear in the findings of fact. The claimant was requested, in the fall of 2003, to obtain a commercial driver's license (CDL) and without objection he did so but did not take the physical or urine test required at that time. The claimant was aware that he needed to do so. In fact, the claimant was in charge of the employer's drug and alcohol testing program. Nevertheless, the claimant refused to obtain such a test. Even the claimant concedes that he operated a truck on at least five different occasions in 2004. The claimant was in violation of Department of Transportation rules and regulations. When the employer learned that the claimant was not on the employer's random drug test list with the firm that handles the drug test for the employer, C. J. Cooper & Associates, the employer instructed the claimant to get himself

on the list. This occurred in the first part of November 2004. The claimant kept putting off the employer and did not schedule himself for a physical or a urine test or drug test. Finally, on November 29 and 30, 2004 and December 1, 2004, the claimant was specifically asked if he had taken a drug test and he responded no. By then the claimant should have been well aware not only that he needed to take a drug test and a physical but that the employer expected him to do so. Finally, on December 2, 2004, the claimant was asked again if he had taken a drug test and he said no and was told to get it that day. The claimant did not do so. The claimant did not even schedule a drug test until December 3, 2004. The claimant testified that he was busy and did not take time, but the administrative law judge notes that when the claimant finally did schedule a drug test on December 3, 2004 for the test to occur on December 8, 2004 that it took only five minutes. The evidence establishes that the claimant was deliberately delaying scheduling a drug test. Finally, on December 3, 2004 the claimant was asked again if he had taken a drug test and answered in the negative. The claimant was then told that if he did not have the drug test that day that he could not work on Monday. The claimant still did not take the drug test. Finally, on Monday, December 6, 2004, the claimant met with both Mr. Adams and the employer's other witness, Scott Gasway, President, and was asked once again whether he had taken a drug test and he answered in the negative and then the claimant was asked whether he was going to take a drug test and he again answered in the negative. The claimant told Mr. Adams and Mr. Gasway that he did not believe that the drug test was required for his job. The claimant did not inform Mr. Adams and Mr. Gasway that he had a drug test scheduled for December 8, 2004. Claimant's testimony to the contrary is not credible. The claimant testified that he did inform them that he had scheduled a drug test but both witnesses for the employer credibly testified that the claimant made no such statement to them but may have indicated that he had an appointment with his own physician but his own physician is not authorized by the employer to conduct such drug tests. The claimant was then suspended. The claimant then had a chance to take his drug test as scheduled on December 8, 2004 but did not do so and the employer was so informed by C. J. Cooper & Associates. The employer called the claimant back on December 15, 2004 and again asked the claimant if he had taken a drug test and when he said no he was given the option of resigning or being discharged. The claimant chose to be discharged and he was discharged.

On the evidence here, the administrative law judge must conclude that the claimant willfully and deliberately failed and refused to take or obtain a drug test or urine test and physical required by the Department of Transportation rules for the claimant to drive a truck which he did drive at least occasionally for his employment. At all material times hereto, the claimant was fully aware that he needed to take a drug test but persisted in failing to do so. Finally in November 2004, the claimant was specifically informed that he had to take a drug test. The claimant testified that he was told only that he had to be on the random drug testing list, but finally the claimant conceded that to get on the random drug testing list he had to have a drug test. During the hearing, the claimant equivocated for a long time on that matter but finally conceded that he knew he had to take a urine test or drug test before he could get on the list. This also taints the claimant's credibility. In any event, the claimant learned in November 2004 that the employer expected him to take the drug test and he still refused and failed to even schedule a drug test until December 3, 2004 even though it only took five minutes when he finally did so. In fact, the evidence establishes that in November, the claimant scheduled a drug test for a new hire but did not bother to schedule one for himself. Finally, when the claimant finally did schedule a drug test, he did not take the drug test. At that time, the claimant was not discharged, he was only suspended and even the claimant agreed that he was suspended at that time. If the claimant had taken the drug test, he would have been reinstated. The claimant refused and was discharged. The administrative law judge is constrained to conclude that the claimant willfully and deliberately failed and refused to take a drug test and that this failure and refusal was a deliberate act or omission constituting a material breach of his duties and obligations

arising out of his worker's contract of employment and evinced a willful or wanton disregard of the employer's interests and, at the very least, is carelessness or negligence in such a degree of recurrence all as to establish disqualifying misconduct. Again, the administrative law judge reiterates that the claimant was aware that he needed to take a drug test and a physical and was in charge of the employer's drug testing program. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$3,100.00 since being suspended from his employment on December 6, 2004 and being discharged on December 15, 2004 and filing for such benefits effective December 5, 2004. The administrative law judge further concludes that the claimant is not entitled to receive such benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision dated January 12, 2005, reference 03, is reversed. The claimant, Kenneth D. Heck, is not entitled to receive unemployment insurance benefits until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. He has been overpaid unemployment insurance benefits in the amount of \$3,100.00.

sc/pjs