

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CARL ERVIN
Claimant

APPEAL NO: 09A-UI-08287-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

SCHENKER LOGISTICS INC
Employer

OC: 04-05-09
Claimant: Appellant (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the June 5, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on June 24, 2009. The claimant participated in the hearing. Kim Paul, Human Resources Assistant, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time forklift operator for Schenker Logistics from September 2, 2008 to March 31, 2009. On March 26, 2009, the employer's agent placed the names of all employees into its computer to randomly select who would be subject to drug tests and the claimant's name was chosen. Mercy Occupational Health sent a team to the employer's premises and the claimant's supervisor notified him when it was his turn to be tested. The conditions were private and sanitary and a split urine sample was taken. Neither the employer nor the claimant believes the medical personnel notified the claimant what drugs would be tested for or asked the claimant after the test if he had ingested anything legal that might cause a false positive test. On Friday, March 27, 2009, the claimant called in and said he was ill because he had been experiencing a great deal of stress in his personal life. He was off work March 30, 2009, and received a phone call from a physician associated with Mercy Occupational Health March 31, 2009, notifying him that he tested positive for marijuana. He asked the doctor about retaking the test and the doctor told him he would need to speak to the employer about that. He talked to the human resources department and was informed they had received the results and sent a certified letter stating he tested positive for marijuana and his employment was terminated. He was told to wait for the letter which would provide further instructions regarding retesting. On April 7, 2009, he received the letter and called and set up an appointment with Mercy Occupational Health for another test of the other portion of his split sample April 8, 2009, and that test came back positive for marijuana as well. The claimant

testified he was at a party where marijuana was being smoked and although he did not partake himself he thinks that the second hand smoke caused the positive test.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

While the claimant denies using marijuana both the original test and the test of the split sample were positive for marijuana. The employer followed the required procedures as set forth by Iowa law in executing the random selection, implementing the test itself and the notification by certified letter. Consequently, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits must be denied.

DECISION:

The June 5, 2009, reference 01, decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs