

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CLAIMANT

Claimant

APPEAL NO. 11A-UI-15991-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SCHUSTER GRAIN CO INC

Employer

OC: 11/13/11

Claimant: Appellant (1)

Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed a timely appeal from the December 6, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on January 18, 2012. Claimant participated. Erica Wenzel represented the employer.

By my signature on this decision, I stipulate that the drug test information submitted in this case will only be made available to the parties to the proceeding in the compliance with 49 USC § 31306(c)(7), which requires that test results and medical information of employees tested under the Omnibus Transportation Employee Testing Act of 1991 remain confidential.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed by Schuster Grain Company as a full-time, over-the-road truck driver from 2009 and last performed work for the employer on November 11, 2011. Claimant's work subjected him to federal Department of Transportation drug testing regulations, including random drug testing. The employer had a written drug testing policy. The policy listed the substances to be screened and these included amphetamine and methamphetamine. Claimant received a copy of the drug testing policy.

Toward the end of his employment, claimant was randomly chosen to be tested for drugs under the employer's policy and under federal requirements. On November 4, the employer notified claimant that he was required to submit to a random drug test. A urine sample was properly taken from claimant and properly analyzed by a certified laboratory using the criteria set forth in 49 CFR Part 40. The sample was split to allow a test of the split sample. The proper chain of custody was followed. The urine specimen tested positive for amphetamine and methamphetamine. The test results were reviewed by a qualified medical review officer (MRO), who verified the result. The MRO attempted unsuccessfully to contact claimant, but then

contacted the employer on November 9, 2011 for assistance in reaching claimant. The employer contacted claimant and provided him with a number he could use to reach the MRO.

On November 11, 2011, claimant contacted the MRO, who informed him of the positive test result. The MRO provided claimant with an opportunity to present a legitimate medical explanation for the positive result reported by the laboratory. Claimant asserted to the MRO that he did not know how the substance got into his body. Claimant offered that he had been taking a prescription for Tramadol and that he had consumed a 5-hour Energy drink. Tramadol is an opioid pain medication, not a stimulant like amphetamine or methamphetamine. The MRO informed claimant of his right to have the other portion of the split sample of his urine specimen tested. Claimant declined that opportunity. Claimant was instead interested in submitting to a new specimen for testing. This was not allowed under the federal DOT regulations.

The employer learned of the positive drug test result on November 11. Claimant requested the opportunity to provide a new specimen for testing. The employer explained that the DOT regulations did not allow testing of a new specimen after a positive drug test. Because claimant was no longer eligible to operate a commercial motor vehicle under the federal DOT regulations, claimant's employment ended that day.

REASONING AND CONCLUSIONS OF LAW:

Administrative Law Judge Steve Wise of the Iowa Workforce Development Appeals Bureau has provided an excellent explanation of the confidentiality requirement that pertains to unemployment insurance appeal decisions in the context of federal DOT drug testing:

The first issue in this case is the effect of the confidentiality requirements of the federal law. The Omnibus Transportation Employee Testing Act of 1991 authorized the United States Department of Transportation (DOT) to prescribe regulations for testing of commercial motor vehicle operators. 49 USC § 31306. Congress required that the regulations provide for "the confidentiality of test results and medical information" of employees tested under the law. 49 USC § 31306(c)(7). Pursuant to this grant of rulemaking authority, the DOT established confidentiality provisions in 49 CFR 40.321 that prohibit the release of individual test results or medical information about an employee to third parties without the employee's written consent. There is an exception, however, to that rule for administrative proceedings (e.g. unemployment compensation hearing) involving an employee who has tested positive under a DOT drug or alcohol test. 49 CFR 40.323(a)(1). The exception allows an employer to release the information to the decisionmaker in such a proceeding, provided the decisionmaker issues a binding stipulation that the information released will only be made available to the parties to the proceeding. 49 CFR 40.323(b). In the statement of the case, a stipulation in compliance with the regulation has been entered.

In my opinion, this federal confidentiality provision must be followed despite conflicting provisions of the Iowa Open Records Act (Iowa Code chapter 22), the Iowa Administrative Procedure Act (APA) (Iowa Code chapter 17A), and Iowa Employment Security Law (Iowa Code chapter 96). The federal confidentiality laws regarding drug testing must be followed because, under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, state laws that "interfere with, or are contrary to the laws of congress, made in pursuance of the constitution" are invalid. Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 604 (1991).

In this case, the Iowa Open Records law, APA, and Employment Security law actually conflict with the federal statute 49 USC § 31306(c)(7) and the implementing regulations 49 CFR 40.321 to the extent that they would require the release of individual test results or medical information about an employee to third parties beyond the claimant, employer, and the decisionmaker in this case. It would defeat the purpose of the federal law of providing confidentiality to permit the information regarding the test results to be disclosed to the general public. Since the decision to discharge the claimant was based on his testing positive on a DOT drug test, it would be impossible to issue a public decision identifying the claimant without disclosing the drug test results. Therefore, the public decision in this case will be issued without identifying information. A decision with identifying information will be issued to the parties; but that decision, the exhibits, and the audio record (all of which contain confidential and identifying information) shall be sealed and not publicly disclosed.

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

Iowa Code Section 730.5 provides the authority under which a private sector employer doing business in Iowa may conduct drug or alcohol testing of employees. In Eaton v Employment Appeal Board, 602 N.W.2d 553 (Iowa 1999), the Supreme Court of Iowa considered the statute and held “that an illegal drug test cannot provide a basis to render an employee ineligible for unemployment compensation benefits.” Thereafter, in Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003), the Iowa Supreme Court held that where an employer had not complied with the statutory requirements for the drug test, the test could not serve as a basis for disqualifying a claimant for benefits. Iowa's drug testing laws, however, do not apply to employees who are required to be tested under *federal* law and regulations. Iowa Code § 730.5-2. Although the court has not addressed this issue, it is logical that the courts would likewise require compliance with federal law before disqualifying a claimant who was discharged for failing a drug test required by federal law and regulations.

The weight of the evidence indicates that the employer discharged the claimant in response to the positive drug test result of his federal DOT mandated drug test and the fact that the positive test result disqualified him under federal DOT regulations from operating a commercial vehicle. The evidence indicates that the appropriate test collection, testing and notice procedures were followed. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the claimant was discharged for misconduct. Accordingly, the claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to claimant.

DECISION:

The Agency representative's December 6, 2011, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw