

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

STEVEN S SCHEID  
924 – 6<sup>TH</sup> AVE  
COUNCIL BLUFFS IA 51501

CON AGRA COUNCIL BLUFFS  
C/O TALX UC EXPRESS  
PO BOX 283  
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-09952-RT  
OC: 08-15-04 R: 01  
Claimant: Appellant (1)

**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, 4<sup>th</sup> 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.

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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Steven S. Scheid, filed a timely appeal from an unemployment insurance decision dated September 2, 2004, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on October 1, 2004, with the claimant participating. Julie Millard, Human Resources Generalist, and Penny Rathbun, Health and Safety Supervisor, participated in the hearing for the employer, ConAgra Council Bluffs.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a

full-time scale operator and mechanic from September 19, 1980 until he was discharged on August 11, 2004. The claimant was discharged for a positive drug test pursuant to the employer's drug testing policy. The claimant was initially suspended on July 29, 2004. The employer has a written drug testing policy, a copy of which was given to all of the employees including the claimant. On July 29, 2004, a urine sample was taken from the claimant under reasonable suspicion circumstances when he had difficulty understanding instructions and other matters. The sample was taken in the nurse's office behind closed doors and with due regard to the claimant's individual privacy and under sanitary conditions. The claimant refused union representation. A pre-drug screen was administered showing non-negative and the claimant was suspended. The sample was then split and sent to a certified lab that tested the sample. There was an appropriate chain of custody for the sample as it was sent to the lab. The results were reviewed by the employer's medical review officer, David Nahin, M.D. The claimant tested positive for methamphetamines. The results of the drug test and the claimant's discharge were sent to the claimant by certified mail return receipt requested. The claimant was informed in that letter that he had a positive drug test and that the sample was split and that he had a right to a confirmatory test that he could request within seven days. The claimant would have to pay for the drug test but the cost would be reimbursed if the confirmatory test was negative. The claimant chose not to have a confirmatory test.

When the urine sample was taken from the claimant, it was taken during regular work hours and the employer paid all of the costs of the taking of the sample and of the test. The claimant was provided an opportunity to provide information relevant to the test. The claimant's urine sample was collected, stored, and transported in a way to preclude contamination. These procedures used for the claimant's drug test are consistent with the employer's drug testing policy. The employer has an employee assistance program and its supervisory personnel for drug testing are given at least two hours of initial training and an annual one-hour of additional training. There is no federal reason or requirement for the claimant's drug test or the employer's drug testing policy as it relates to the claimant.

#### REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was.

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).

The parties testified and the administrative law judge concludes that the claimant was suspended on July 29, 2004 and then discharged on August 11, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a suspension and/or a discharge, the claimant must have been suspended and/or discharged for disqualifying misconduct. Here the only allegation of disqualifying misconduct is a positive drug test pursuant to the employer's drug testing policy. In Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553 (Iowa 1999), the Iowa Supreme Court determined that in order for a positive drug test to be misconduct sufficient to disqualify someone from unemployment insurance benefits, it had to meet the requirements of the Iowa drug testing law at Iowa Code Section 730.5 and that drug test would be scrutinized carefully to see that drug test complied with Iowa law. This decision was expanded by Harrison v. Employment Appeal Board and Victor Plastics, Inc., 659 N.W.2d 581 (Iowa 2003). In that decision, the Iowa Supreme Court avoided determining whether "strict" or "substantial" compliance with Iowa Code section 730.5 was sufficient in order to disqualify someone for a positive drug test but the court determined that written notice of a positive drug test must be made by certified mail return receipt and the notice must inform the employee of his or her right to have a second confirmatory test done at a laboratory of his or her choice and that the employee has seven days to request a second test. This notice was not sent to the claimant in that case. However, in this case, that notice was sent to the claimant. The administrative law judge concludes that the notice sent to the claimant, certified mail return receipt requested, complies with the requirements in Harrison. Further, the administrative law judge concludes that the drug test administered on the claimant and the employer's drug testing policy therefore, comply with all other provisions of Iowa Code section 730.5. The compliance is set out in the findings of fact. The compliance here is not only substantial, but also strict. There is no evidence that the claimant's drug test or the employer's drug testing policy is required by federal rules or requirements, which would require compliance with different requirements for the drug test.

In summary, and for all of the reasons set out above, the administrative law judge concludes that the drug test conducted on the claimant and the employer's drug testing policy comply with Iowa Code section 730.5. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct, namely, a positive drug test in violation of the employer's drug testing policy. 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.

DECISION:

The representative's decision of September 2, 2004, reference 01, is affirmed. The claimant, Steven S. Scheid, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct.

pjs/b