

**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**

**JON M BUCHFINCK
705 FAIR MEADOW DR
WEBSTER CITY IA 50595**

**VAN DEIST SUPPLY COMPANY
PO BOX 610
WEBSTER CITY IA 50595**

**Appeal Number: 04A-UI-02545-RT
OC: 02/01/04 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, 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.

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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Jon M. Buchfinck, filed a timely appeal from an unemployment insurance decision dated March 1, 2004, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on March 30, 2004, with the claimant participating. Walt Sayer, Senior Vice President, participated in the hearing for the employer, Van Diest Supply Company. Brenda Keenan, Personnel Manager, was available to testify for the employer but not called because her testimony was unnecessary and would have been repetitive. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Employer's Exhibit One through Three and Claimant's Exhibits A through C were admitted into evidence.

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 through Three and Claimant's Exhibits A through C, the administrative law judge finds: The claimant was employed by the employer as a full time lab shift supervisor from December 18, 1990 until he was discharged effective February 11, 2004. The claimant was discharged for a positive drug test for marijuana administered according to the employer's drug testing policy. There is no federal reason for the claimant's drug test. The employer has a written drug testing policy, which appears at Employer's Exhibit One. The claimant received a copy of the policy and then signed an acknowledgement therefore. The policy provides for a random testing of employee's in safety sensitive positions and the claimant was employed in such a safety sensitive position. The claimant was selected for random drug test as an employee in a safety sensitive position. On January 27, 2004, a urine sample was taken by the claimant under the supervision of Kevin Sharp, the employer's regulatory affairs manager, under sanitary conditions and with due regard to the claimant's privacy and in a manner to preclude contamination. The claimant was given an opportunity at that time to provide any information relevant to the test. Mr. Sharp has received the appropriate training necessary to supervise the taking of such samples. The claimant's sample was placed in two viles. One vile was sent to the employer's medical review officer, Dr. Lattella, who performed a drug test on the sample. That test proved positive for marijuana. The other vile was then sent for a confirmatory test to Medtox Laboratories, a certified lab, for further testing. That test showed positive for marijuana as shown at Employer's Exhibit Two. The claimant was then called in and informed of the positive drug test on February 3, 2004 and asked to provide additional information relative to the test. The claimant was informed at that time of his opportunity to have a confirmatory test. The sample sent to Medtox Laboratories was split by the laboratory and their test was performed on only one portion of the sample. The other portion was preserved for a second confirmatory test at the claimant's request.

The claimant was then sent a letter dated February 3, 2004, certified mail return receipt requested, informing him in writing of the positive drug test and informing him further that he had seven days to request and obtain a confirmatory test of the second sample or split sample at Medtox Laboratory, but informed that he could have the confirmatory test done at an approved laboratory at his expense, but further informed that if the confirmatory test was negative, the claimant would be reimbursed for the cost of his second confirmatory test. This letter was received by the claimant. The letter and the return receipt appear at Employer's Exhibit Three. The claimant chose not to have the confirmatory test.

The employer has established an appropriate awareness program informing the employees of benefits and posting notices. The employer also maintains a resource file and provides information to employees appropriately. The employer's policy provides for termination upon a confirmed positive test. These requirements are uniform. The employer does not require rehabilitation, but does offer it and the claimant refused. The claimant's sample was taken immediately after the end of his shift. The employer paid all the costs associated with the claimant's drug test. The samples of the claimant followed a chain of custody as shown at Claimant's Exhibit C. The claimant's samples were collected, stored, and transported so as to reasonably preclude contamination.

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).

In order to be disqualified to receive unemployment insurance benefits pursuant to 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 only allegation of disqualifying misconduct here was 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 such drug test would be scrutinized carefully to see if the drug test complied with Iowa Law. There is no evidence here that the drug test administered by the claimant was required by any federal law or rule and therefore the drug test must comply with Iowa Code Section 730.5. As noted in the Findings of Fact, the administrative law judge concludes that the employer's drug testing policy and the claimant's drug test apply in all respects with Iowa Code Section 730.5. In Harrison v. Employment Appeal Board and Victor Plastics, Inc., 659 N.W.2d 581 (Iowa

2003), the Iowa Supreme Court avoided determining whether “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 it must tell the employee that he has seven days to request a second test. This notice was sent to the claimant in this case. The administrative law judge concludes that it is not necessary here to go through Iowa Code Section 730.5 item by item and note the employer’s compliance. The Findings of Fact set out the relevant facts related to the employer’s drug testing policy and the claimant’s drug test. The administrative law judge concludes that both comply with Iowa Code Section 730.5 and further comply with Eaton and Harrison. In fact, the employer goes beyond. In effect the claimant’s urine sample was divided into three portions. One portion was tested by the medical review officer and proved positive and a second portion was then tested by a certified lab, Medtox Laboratories, and also was positive and the third sample was preserved for the claimant’s confirmatory test, which he refused.

Accordingly, and for all the reasons set out above and in the Findings of Fact, the administrative law judge concludes that the drug test conducted on the claimant complies with Iowa Code Section 730.5 and, as a consequence, the claimant’s positive drug test is disqualifying misconduct and 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 dated March 1, 2004, reference 01, is affirmed. The claimant, Jon N. Buchfinck, is not entitled to receive unemployment insurance benefits until or unless he requalifies for such benefits.

kjf/kjf