

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JAMES L BOYD**  
Claimant

**APPEAL NO. 07A-UI-10966-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SCHENKER LOGISTICS INC**  
Employer

**OC: 10/28/07 R: 03  
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

James L. Boyd (claimant) appealed a representative's November 19, 2007 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Schenker Logistics, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 12, 2007. The claimant participated in the hearing. Rick Talcott appeared on the employer's behalf and presented testimony from one other witness, John Phipps. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision reversing the representative's decision and allowing benefits.

**FINDINGS OF FACT:**

The claimant started working for the employer on September 26, 2007 when the employer took over the contract for warehousing and distribution services at the employer's business client's Iowa City, Iowa location. He worked full time as a forklift operator. His last day of work was October 16, 2007. The employer suspended him that day and discharged him on October 23, 2007. The reason asserted for the discharge was failing a drug test.

The claimant was ordered to submit to a drug test under the employer's contract with the business client providing for drug testing of all employees who had been employed at the Iowa City site for two years; the test was not required or dictated under federal department of transportation regulations. All two year employees at the site were ordered to report for testing; the claimant was ordered and did report for testing on October 15, 2007. He provided a urine sample in a sanitary and secure facility, and the sample was placed into a labeled container. The technician at the laboratory performed some type of preliminary screening in the claimant's presence, and indicated that the result was "inconclusive," so it would be sent on for further testing. As a result of the determination that the result was "inconclusive," the claimant was placed on suspension pending further results.

On October 19, 2007 the claimant spoke to the laboratory's medical review officer, who advised him that the sample had tested positive for trace amounts of marijuana. On October 22, 2007, the employer sent the claimant a letter by certified mail indicating he was being discharged for a

violation of the employer's drug policy and that he had five days to request a retesting of the split portion of the sample. The employer's testing cost was \$40.00; the claimant's cost would have been \$125.70.

The employer's policy provides that an employee can be discharged for being under the influence of a controlled substance or can be discharged for refusing a drug test; it does not provide that an employee can be discharged for testing positive on a drug test. It also does not specify the conditions under which an employee can be required to submit for testing.

### **REASONING AND CONCLUSIONS OF LAW:**

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

Iowa Code § 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 reason cited by the employer for discharging the claimant is failing a drug test. In order for failure of a drug test to be disqualifying misconduct, unless federal law applies, it must be based on a drug test performed in compliance with Iowa's drug testing laws. Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003); Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553, 558 (Iowa 1999). The Eaton court said, "It would be contrary to the spirit of chapter 730 to allow an employer to benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." Eaton, 602 N.W.2d at 558. In Harrison, the court specifically noted the statutory requirement that the employer must give the employee a written notice of the positive drug test, sent by certified mail, return receipt requested, informing the employee of his right to have the split sample tested at a laboratory of his choice and at a cost consistent with the employer's cost. The employer provided a written notice by certified mail, but in only provided five days to request a retest, not allowing seven as specified in Iowa Code § 730.5-7-i(1). The fee that would have been charged to the claimant for the retest of the split sample also was not "consistent with the employer's cost for conducting the initial confirmatory test on an employee's sample" as required by the Code. Ibid. The employer's policy does not "provide uniform requirements for what disciplinary or rehabilitative actions an employer shall take against an employee or prospective employee upon receipt of a confirmed positive test result for drugs" as required by the statute. Iowa Code § 730.5-9-b.

More importantly, in order to be subjected to testing under the Iowa law, an employee can only be required to submit in the following six circumstances:

- a. Random or unannounced drug or alcohol testing of employees. Iowa Code § 730.5-8-a.
- b. During or post drug or alcohol rehabilitation. Iowa Code § 730.5-8-b.
- c. Reasonable suspicion of the use of alcohol or drugs. Iowa Code §§ 730.5-8-c; § 730.5-1-i.
- d. Pre-employment of potential employees. Iowa Code § 730.5-8-d.
- e. Where required by federal law or regulation or by law enforcement. Iowa Code § 730.5-8-e.
- f. Post workplace accident testing. Iowa Code § 730.5-8-f.

The only testing provision that could be applicable to the claimant in this case is the random or unannounced testing under Iowa Code § 730.5-8-a. However, to be selected for random unannounced testing:

The selection of employees to be tested from the pool of employees subject to testing shall be done based on a neutral and objective selection process by an entity independent from the employer and shall be made by a computer-based random number generator that is matched with employees' social security numbers, payroll

identification numbers, or other comparable identifying numbers in which each member of the employee population subject to testing has an equal chance of selection for initial testing, regardless of whether the employee has been selected or tested previously. The random selection process shall be conducted through a computer program that records each selection attempt by date, time, and employee number.  
Iowa Code §730.5-1-I.

Further, the “pool” from which the employee is so selected must be:

- (1) The entire employee population at a particular work site of the employer except for employees who are not scheduled to be at work at the time the testing is conducted because of the status of the employees or who have been excused from work pursuant to the employer's work policy prior to the time the testing is announced to employees.
- (2) The entire full-time active employee population at a particular work site except for employees who are not scheduled to be at work at the time the testing is to be conducted because of the status of the employee, or who have been excused from work pursuant to the employer's working policy.
- (3) All employees at a particular work site who are in a pool of employees in a safety-sensitive position and who are scheduled to be at work at the time testing is conducted, other than employees who are not scheduled to be at work at the time the testing is to be conducted or who have been excused from work pursuant to the employer's work policy prior to the time the testing is announced to employees.  
Iowa Code § 730.5-8-a.

The claimant was not selected “randomly” under the required procedure, nor was the “pool” from which he was “selected,” the two-year employees at the site, a recognized or allowable “pool.”

The employer has not substantially complied with the drug testing regulations. The employer asserts that by virtue of having a positive drug test the claimant was “under the influence” of the drug at work in violation of its drug policy. The Iowa court has defined “under the influence of alcohol” as when one of the following is true: “(1) the person's reason or mental ability has been affected; (2) the person's judgment is impaired; (3) the person's emotions are visibly excited; and (4) the person has, to any extent, lost control of bodily actions or motions.” Benavides v. J.C. Penney Life Ins. Co., 539 N.W.2d 352 (Iowa 1995). The employer has not established any of these criteria, nor has it presented any evidence that having a positive drug test is conclusively equivalent to being “under the influence.” Further, the employer's stated reason for the discharge was not that the claimant was under the influence, but that he failed the drug test. While the administrative law judge cannot condone the use of controlled substances such as marijuana, the employer has not met its burden to show disqualifying work-connected misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

**DECISION:**

The representative's November 19, 2007 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

---

Lynette A. F. Donner  
Administrative Law Judge

---

Decision Dated and Mailed

ld/css