

**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**

**WAYNE A MALCOM  
901 NORTHERN BLVD  
RIO RANCHO NM 87124**

**BGL LIVESTOCK TRUCKING LLC  
2137 COOLIDGE AVE  
INWOOD IA 51240**

**Appeal Number: 05A-UI-03244-DT  
OC: 02/20/05 R: 12  
Claimant: Appellant (2)**

**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

STATEMENT OF THE CASE:

Wayne A. Malcom (claimant) appealed a representative's March 22, 2005 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with BGL Livestock Trucking, L.L.C. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 14, 2005. The claimant participated in the hearing. Bill Groeneweg appeared on the employer's behalf. 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.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on November 10, 2003. He worked full time as an over-the-road truck driver. His last day of work was January 28, 2005. The employer discharged him on that date. The reason asserted for the discharge was the employer's belief that the claimant continued to have problems with drugs.

On January 26, 2005, the claimant was at his home in New Mexico after completing a run on January 20, 2005. He was scheduled to pick up a load that evening. In the afternoon, Mr. Groeneweg, the manager and a co-owner, contacted the claimant and indicated that he would be up for random drug testing. The claimant picked up his load that evening and started for the delivery location in Bartlett, Nebraska, in the northeast corner of the state, approximately 148 miles from Sioux City, Iowa. He made the delivery at approximately 1:00 a.m. the morning of January 28, 2005. He slept in his cab at the delivery site for a few hours, then drove to Sioux City. He was in Sioux City at approximately 9:42 a.m. when he contacted the employer regarding authorization for some expense transactions. He was still in Sioux City at approximately 11:16 a.m. when he was contacted by another of the employer's managers and told he needed to come into the employer's yard, which was approximately 72 miles away from Sioux City. The claimant did not arrive at the yard until approximately 5:00 p.m. The claimant's explanation for his delay was that he did not understand that there was any deadline for his return to the yard and did not understand that the employer had intended for him to submit to testing yet that day; he had known that there was not another load for him to pick up that evening, so he did not attempt to return until approximately the end of the work day.

Mr. Groeneweg concluded that the reason for the claimant's delay was that he was seeking to avoid submitting to drug testing, and concluded that the claimant was still involved in drug use. The claimant had previously acknowledged that he had used stimulants while driving in order to stay awake and that he had gone through treatment. However, he denied any usage within at least the last six months. Mr. Groeneweg concluded in part that the claimant might be continuing to use stimulants because early in January 2005 the claimant had a rider in his truck who turned out to be under the influence of drugs. The rider had claimed to have been hired by the employer when he asked the claimant for a ride to the employer's facility; after the rider was found to be under the influence of drugs, the claimant believed that the employer was trying to "set him up" for trouble with drugs, and had even indicated to the employer that because of the incident, he was going to quit at the end of January. However, as time passed, the claimant changed his mind about quitting, and the employer would have allowed the claimant to continue his employment, had Mr. Groeneweg not concluded that the claimant was seeking to avoid drug testing on January 28, 2005.

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 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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
  - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
  - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:

- a. Manifest equal culpability, wrongful intent or evil design; or
- b. Show an intentional and substantial disregard of:
  1. The employer's interest, or
  2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant was the belief that the claimant was seeking to avoid a drug test and the belief that the claimant would not pass a drug test. The employer never gave the claimant a set deadline for him to return to the employer's yard and never specifically told him that he would be subject to testing that very day. Further, when the claimant did arrive, the employer did not seek to have the claimant submit to testing at some alternative testing location; the claimant never affirmatively declined to submit to testing. In order for a violation of an employer's drug or alcohol policy to be disqualifying misconduct, it must be based on a drug policy that is in compliance with Iowa's drug testing laws and the employer's application of the policy must be consistent with the terms of the policy itself. 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). Under the circumstances of this case, the claimant cannot be found to have "refused testing," and the employer has not established by objective evidence that the claimant in fact was continuing to use drugs. In this case, the claimant's delay in returning promptly to the employer's yard was perhaps the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion, but does not establish drug test refusal or other intentional misconduct. The employer has not met its burden to show disqualifying 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 March 22, 2005 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.

ld/sc