

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JACOB D NESTOR**  
Claimant

**APPEAL NO: 09A-UI-18986-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**KUM & GO LC**  
Employer

**OC: 10/25/09**

**Claimant: Respondent (2/R)**

Section 96.5-2-a – Discharge  
Section 96.3-7 – Recovery of Overpayment of Benefits

**STATEMENT OF THE CASE:**

Kum & Go, L.C. (employer) appealed a representative's December 8, 2009 decision (reference 01) that concluded Jacob D. Nestor (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 1, 2010. The claimant received the hearing notice and responded by calling the Appeals Section on December 30, 2009. He indicated that he would be available at the scheduled time for the hearing at a specified telephone number. However, when the administrative law judge called that number at the scheduled time for the hearing, the claimant was not available; therefore, the claimant did not participate in the hearing. Kate Wolf appeared on the employer's behalf. During the hearing, Employer's Exhibits One through Five were entered into evidence. Based on the evidence, the arguments of the employer, 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 March 9, 2009. He worked part time as a sales associate at the employer's Clear Lake, Iowa convenience store. His last day of work was on or about September 14, 2009. The employer discharged him on September 15, 2009. The stated reason for the discharge was having a positive drug test in violation of the employer's drug policy.

The employer's drug policy, of which the claimant was on notice, provides for random drug testing. On September 10 the claimant was one of 14 employees selected as 90 percent of the store employees to be subjected to testing. Selection was made by the employer's independent testing administration company.

A sample was collected at a local health clinic, and a split portion of the sample was retained. A medical review officer (MRO) from the testing laboratory contacted the claimant at some time to learn whether there was any medical reason for an apparent positive test, and apparently there was none. On September 14 the laboratory issued its test results indicating that the sample was positive for marijuana.

As a result of this test result, on September 15 the claimant was discharged under the employer's policy which provides for discharge in any case of a positive drug test. He was sent a letter by certified mail, which he received on September 19, which also advised him of his right to have the split portion of the sample retested at his expense if he made a request within seven days. While costs could vary depending on which laboratory might be selected, the employer believed that a test of the split portion could be done at a rate comparable to that paid by the employer for the testing of the initial sample, between \$35.00 and \$45.00.

The claimant established a claim for unemployment insurance benefits effective October 25, 2009. The claimant has received unemployment insurance benefits after the September 15 separation from this employer. While the claimant did have other wages from another employer after his separation from employment with this employer, Agency records indicate that currently those wages are inadequate to requalify the claimant for benefits after the September 15, 2009 separation.

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

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.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason the employer discharged the claimant is violation of the drug policy by having a positive drug test. In order for a violation of an employer's drug or alcohol policy to be disqualifying misconduct, it must be based on a drug test performed in compliance with Iowa's drug testing laws. 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. The employer also needs to be in conformance with its own policies. The employer complied with the drug testing regulations and its own policies. A preponderance of the evidence establishes the claimant violated the employer drug policy. The claimant's violation of the policy shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded the Claims Section.

**DECISION:**

The representative's December 8, 2009 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of September 15, 2009. This disqualification continues until the claimant has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue and whether the claimant is eligible for a waiver of any overpayment.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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