

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

JAMES MEISLAND
814 S 4TH ST
MAQUOKETA IA 52060

FAMILY DOLLAR SERVICES INC
C/o TALX UCM SERVICES INC
PO BOX 283
ST LOUIS MO 63166-0283

AMENDED

Appeal Number: 05A-UI-11974-BT
OC: 10/23/05 R: 04
Claimant: Respondent (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, 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 96.4-3 - Able and Available for Work
Section 96 5-2-a – Discharge for Misconduct
Section 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Family Dollar Services, Inc. (claimant) appealed an unemployment insurance decision dated November 18, 2005, reference 02, which held that James Meisland (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 12, 2005. The claimant participated in the hearing. The employer participated through Sharon Beck, Human Resources Area Manager. The claimant has now separated from the employer but the

separation has not been litigated. Both parties waived formal notice so the separation issues could be addressed in this hearing.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant testified he is able and available to work. He was employed as a full-time shipper/loader from March 11, 2002 through November 14, 2005. The employer has a written drug policy informing employees of the drug testing procedures and for which drugs the employer will be testing. The claimant was chosen on a random basis by a third party company for a drug test to be performed on October 20, 2005. He was given the opportunity to inform the company nurse, who was the medical review officer, of any drugs he was taking that might have an effect on the outcome of the test. The initial screening test was positive for marijuana and the claimant was placed on administrative leave at that time. The split sample was sent to Choice Point, an independent lab, where the result was the same.

The claimant was notified by certified mail, return receipt requested, of the positive result and his right to obtain a confirmatory test of the secondary sample that was taken at the time of the initial test. The letter was sent on October 26, 2005 but the claimant did not sign for the letter until November 1, 2005. The claimant was advised he had seven working days in which to respond and was informed that if a confirmatory test yielded a negative result, the employer would reimburse him for the cost of the test. The form sent with the letter clearly stated that if there was no response, the test would be considered final and the claimant would be discharged. The employer gave the claimant some additional time to respond but discharged him effective November 14, 2005 when it had not heard from him.

The claimant filed a claim for unemployment insurance benefits effective October 23, 2005 and has received benefits after the separation from employment in the amount of \$1,101.00.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the claimant is able and available for work and the Administrative Law Judge concludes he does meet the availability requirements of the law. The claimant testified he is able and available for work and there is no evidence disputing that claim.

The next issue to be determined is whether the employer discharged the claimant for work-connected misconduct. 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.

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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The claimant was discharged for violation of the employer's drug and alcohol policy due to his positive drug test for marijuana. Iowa Code § 730.5 sets forth the rules by which a private company may screen its employees for use of illegal drugs. The employer has a written drug testing policy per Iowa Code § 730.5(9)(b) and tested the claimant on a random basis. The claimant was advised of the drugs to be tested and was given the opportunity to advise the medical review officer of any drugs he was taking that might have affected the outcome. Iowa Code § 730.5(7)(c)(2). The test was performed during the workday at the medical office within the facility and split samples were taken at the time of collection. Iowa Code §§ 730.5(6) and (7)(a-c). The sample was sent to a lab where a medical review officer reviewed and interpreted the confirmed positive test result. Iowa Code § 730.5(7)(g). The claimant was notified by certified mail, return receipt requested of the positive result and his right to obtain a confirmatory test of the secondary sample. Iowa Code § 730.5(7)(i)(1) and (2). He was advised if he wanted to proceed to test the secondary sample, he needed to notify the employer within seven working days. The claimant took no further action and the positive test result for marijuana was considered final. The employer has met the requirements of Iowa Code § 730.5. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The unemployment insurance decision dated November 18, 2005, reference 02, is reversed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant is overpaid benefits in the amount of \$1,101.00.

sdb/pjs/kjw