

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

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Appeal Number: 05A-UI-02440-BT
OC: 01/30/05 R: 01
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 5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Mosaic (employer) appealed an unemployment insurance decision dated March 2, 2005, reference 01, which held that Stephanie Adams (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 March 28, 2005. The claimant participated in the hearing. The employer participated through Betty Fink, Direct Support Manager; Dennis South, Program Coordinator; Jean Matthews, Safety and Wellness Director; and Lynn Corbeil, Employer Representative. Employer's Exhibits One through Five were admitted into evidence.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time direct support associate from August 13, 1996 through January 28, 2005. The employer has a written drug policy that informs employees of the drug testing procedures and for which drugs the employer will be testing. The policy provides that the employer may test an employee based on reasonable cause. The employer received a tip from a citizen of Denison that the claimant was using illegal drugs. The employer arranged to test the claimant for illegal drugs in the restroom at the work facility by placing a blue chemical in the toilet. Betty Fink, Direct Support Manager and Dennis South, Program Coordinator were both properly trained to perform initial drug tests and conducted the test. The claimant provided a urine sample and although denied using illegal substances, indicated the test might be positive because she visited a house where she was around others using drugs. The initial screening tested positive for amphetamines and methamphetamines and the sample was split at that time. The claimant was suspended pending confirmation of the positive test conducted by Clinical Reference Laboratories.

If the initial drug screening is positive, the employer automatically sends it to an outside lab and the employer pays for the second test. The second test was positive for amphetamines at 3536 milliliters when the cutoff value is 500. The test also revealed the claimant tested positive for methamphetamines by over 10,000 milliliters when the cutoff value is again 500. The lab notified the claimant of the results and asked her about any medications she was taking that might affect the outcome of the tests. The claimant was illegally taking a prescription pain pill prescribed for someone else but she did not reveal that to the medical review officer.

The employer sent the claimant a certified, return receipt requested letter notifying her of the results and her dismissal. She was advised of the opportunity to have a second drug test performed from the initial sample at her own expense and told to call the employer within five working days if she wanted this done. The claimant offered evidence that she went to a hospital that same night and had a drug test performed that was negative. The claimant never contacted the employer about having the original sample retested because she said it was cost prohibitive. The employer could not accept the results of the second sample since it was not done on the original sample and the employer was not aware of the procedures under which the test was performed.

The claimant filed a claim for unemployment insurance benefits effective March 2, 2005 and has received benefits after the separation from employment in the amount of \$1,386.00.

REASONING AND CONCLUSIONS OF LAW:

The issue 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 claimant was discharged for violation of the employer's drug and alcohol policy due to her positive drug test for amphetamines and methamphetamines. 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 based on reasonable cause. The claimant was advised of the drugs to be tested and was given the opportunity to advise the medical review officer of any drugs she was taking that might have affected the outcome. Iowa Code § 730.5(7)(c)(2). Certified employees collected an initial sample of urine and split samples were taken at the time of collection. Iowa Code §§ 730.5(6) and (7)(a-c). The initial screening was positive and the test was sent out to the Clinical Reference Laboratories. A medical review officer reviewed and interpreted the confirmed positive test result and notified the claimant of the positive results before reporting the results to the employer; Iowa Code § 730.5(7)(g). The medical review officer reported that no medications the claimant was legally taking could have given a positive test result for cocaine. The claimant was notified by certified mail, return receipt requested of the positive result and her right to obtain a confirmatory test of the secondary sample. Iowa Code § 730.5(7)(i)(1) and (2). She was advised if she wanted to proceed to test the secondary sample, she needed to notify the human resources manager within five working days but this was not done. Whether or not the claimant had a subsequent drug test performed on a different urine sample is irrelevant as the subsequent test would have had to have been done on the secondary sample taken at the same time as the original test.

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 March 2, 2005, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant is overpaid benefits in the amount of \$1,386.00.

sdb/pjs