

**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**

**JENNIFER L EINERTSON
5205 SE 26TH CT
DES MOINES IA 50320-2699**

**NORTHWEST AIRLINES INC
C/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283**

**VAN M PLUMB
STE A
1332 GRAND AVE
WEST DES MOINES IA 50265**

**Appeal Number: 06A-UI-03832-HT
OC: 03/05/06 R: 02
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer, Northwest Airlines (NWA), filed an appeal from a decision dated March 23, 2006, reference 01. The decision allowed benefits to the claimant, Jennifer Einertson. After due notice was issued a hearing was held by telephone conference call on April 25, 2006. The claimant participated on her own behalf and was represented Attorney Van Plumb. The employer participated by Customer Service Manager Gretchen Schlader. Exhibits One and A were admitted into the record.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Jennifer Einertson was employed by NWA from October 24, 1997 until March 7, 2006. She was a full-time supervisor of ground operations. The employer has a drug and alcohol policy, which provides for random testing of employees under the Federal Department of Transportation regulations.

Ms. Einertson had been randomly tested around a dozen times during the course of her employment. She was negative every time. However, on February 21, 2006, she gave a sample as she had done in the past and the results of that test showed positive for cocaine. She discussed her prescription and over the counter drugs with the medical review officer and requested the split sample be retested. She admitted she had not washed her hands before giving the sample, although this is required and she had been instructed to do this on the prior occasions when she was tested.

The claimant made the same request to Customer Service Manager Gretchen Schlader at a meeting on February 27, 2006, at which she answered questions about her drug usage. The request was also made through her union representative but the test was never done. Finally on February 28, 2006, she paid for a new sample to be tested and the results of that test were negative.

After the question and answer with Ms. Schrader the matter was referred to the employee relations office and she was discharged under the zero tolerance policy.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes she is not.

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 claimant was discharged solely on the basis of the random drug test showing positive for cocaine. While the employer's policy may be zero tolerance, the administrative law judge must take into consideration other factors. Most telling is that the claimant's prior dozen or so drug tests were negative. Also of concern was that her request to have the split sample retested were completely ignored. The judge would consider that, given her prior history of negative tests over the past eight and a half years, the employer might be concerned about the accuracy of the test and allow either a retest of the split sample or another sample to be tested.

The claimant acknowledged she knew she was to wash her hands before giving the sample but did not do so on February 21, 2006. She handles luggage for the airline and had done so prior to giving the sample on that date. While it was not prudent of her to have ignored the protocol, especially since she was well aware of it, it should still have given the employer grounds for another test.

While the administrative law judge does has reviewed the results from the February 21, 2006, test, no test is infallible and neither is any technician. There is sufficient doubt about the accuracy of the test, again especially in light of Ms. Einertson's prior tests all being negative, that it cannot be relied upon exclusively. Both the claimant and the employer have submitted drug tests with opposite results. The employer has failed to present any other evidence to support its contention the claimant was discharged for being under the influence of drugs while at work and has not met its burden of proof. Disqualification may not be imposed.

DECISION:

The representative's decision of March 23, 2006, reference 01, is affirmed. Jennifer Einertson is qualified for benefits, provided she is otherwise eligible.

bgh/pjs