

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

Appeal Number: 04A-UI-06288-ET
OC: 05-09-04 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 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 28, 2004, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on June 14, 2004. The claimant participated in the hearing. Saundra Meyers, Human Resources Manager, participated in the hearing on behalf of the employer. Employer's Exhibits One, Two and Three were admitted into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time bulk sign out clerk for Family Dollar Services from

March 27, 2002 to June 11, 2004. On May 10, 2004, the claimant was selected for random drug testing per the employer's policy (Employer's Exhibit One). The testing was conducted onsite and the claimant believes she tested negative. Manager Dave Klein asked the claimant several times how she passed the test and eventually the claimant stated, "What do you want me to say – that I put Visine in there?" Mr. Klein reported the claimant's comment to the employer and the claimant was required to submit to another test at a local hospital with a medical technician observing while she provided the sample. The claimant was suspended pending receipt of the results from the lab and medical review officer. On May 17, 2004, the employer was notified the claimant tested positive for methamphetamine (Employer's Exhibit Two). The employer sent the claimant a certified letter May 18, 2004 notifying her of the test results and her right to a confirmatory test (Employer's Exhibit Two). The postal service attempted to deliver the letter to the claimant May 21, 26 and June 7, 2004 and left notices for the claimant stating the letter could be picked up at the post office but the claimant did not respond (Employer's Exhibit Three). She told the employer she did not have transportation and could not get to the post office and the employer sent a copy of the letter to the claimant via regular mail. The employer terminated the claimant's employment effective May 17, 2004, for violation of its drug/alcohol policy.

The claimant has claimed and received unemployment insurance benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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 of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). While the claimant argues the employer violated its drug testing policy because her test was not random and the employer violated her right to privacy by having a medical technician at the hospital observe her when she provided the second sample, the administrative law judge is not persuaded by her argument. The first test on May 10, 2004 was random and in compliance with the employer's policy and Iowa law. The second test was the result of an allegation of tampering with the first sample, which gave the employer reasonable cause to conduct a second test witnessed by medical personnel to insure tampering would not occur again. The second test was positive for methamphetamine and violated the employer's policy. The employer made every attempt to notify the claimant of the results by certified mail but the claimant did not respond to those efforts and did not go to the post office to pick up the letter, and the employer was forced to inform the claimant of the results by phone and regular mail. The employer has met the requirements of Iowa Code Section 730.5. The claimant's drug screen was positive and a violation of the employer's policy. Her actions May 10, 2004 demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. Consequently, the administrative law judge concludes the employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). 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 May 28, 2004, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as 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 \$2,576.00.

je/tjc