

**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**

**JAY D BETTIN
116 PEEBLE LANE APT 14
CARROLL IA 51401**

**EQUIPMENT BROKERS INC
720 NORTHWESTERN AVE
AUDUBON IA 50025-1610**

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**Appeal Number: 05A-UI-08786-RT
OC: 07/24/05 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

STATEMENT OF THE CASE:

The employer, Equipment Brokers, Inc., filed a timely appeal from an unemployment insurance decision dated August 19, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Jay D. Bettin. After due notice was issued, a telephone hearing was held on September 29, 2005, with the claimant participating. Audrey Petersen, Controller, participated in the hearing for the employer. The employer was represented by William D. Scherle, Attorney at Law. Employer's Exhibits 1 and 2 were admitted into evidence. Employer's Exhibit 3 was not admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. The hearing in this matter was originally scheduled for September 12, 2005, at 3:00 p.m. and rescheduled at the employer's request.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits 1 and 2, but not Employer's Exhibit 3, the administrative law judge finds: The claimant was employed by the employer as a full-time sales person from December 1, 2003 until he was discharged on July 1, 2005. The claimant was discharged for poor attendance and personal addictions and lifestyle violating the employer's policies. In April of 2005, the claimant was hospitalized for a couple of weeks, but the employer continued to pay the claimant even though he had no vacation to take. This hospitalization was related to some kind of an allergy the claimant had. The claimant was able to return to work but only part time and worked approximately 50 percent of the working time that was available during the time before his discharge because of his medical conditions. The claimant properly reported his absences. The employer has a policy in its handbook, of which the claimant was aware, that provides that an employee must call in and notify the employer of an absence prior to the employees start time.

On June 9, 2005, the claimant was arrested for driving while barred. The claimant's vehicle was searched pursuant to that arrest and the police officer found pieces of plant material believed to be marijuana on the front seat and a canister in the glove compartment, which the officer believed contained marijuana. Under the front driver's seat, the officer found an orange plastic bong, which contained what appeared to be burnt marijuana. When the officer searched the car he detected a strong odor of burnt marijuana. The claimant admitted to the officer that the marijuana was his and he admitted to smoking the marijuana in his car the night before. The complaint and affidavit are shown at Employer's Exhibit 1. The claimant entered into a plea bargain for the criminal charges against him and the claimant pled guilty to operating a motor vehicle while intoxicated, being under the influence of marijuana. The claimant was sentenced to 14 days. The claimant admitted that he had smoked marijuana the night before he went to work. The claimant went to work in the morning. When the claimant was stopped by the police officer he was on his lunch break from the employer. The police officer informed the employer, that the strength of the odor he detected in the car indicated the claimant had smoked the marijuana more recently than he had said and in the morning of June 9, 2005. The employer has a policy in its handbook, a copy of which the claimant received and for which he signed in acknowledgement and of which he was aware, prohibiting reporting to work under the influence of alcohol or an illegal narcotic or bringing alcohol or an illegal narcotic on the company premises. This is shown at Employer's Exhibit 2. The claimant's possession of marijuana during his lunch break from the employer and his plea of guilty for OWI related to marijuana and the smoking of marijuana in the morning of June 9, 2005, caused his discharge. The claimant did work for the employer during the morning of June 9, 2005. Previously, the claimant had received a verbal warning from the then general manager for coming to work with alcohol on his breath and informed the claimant that if it happened again he would be discharged. The employer's policies, as shown at Employer's Exhibit 2, provide for immediate discharge.

Pursuant to his claim for unemployment insurance benefits filed effective July 24, 2005, the claimant has received unemployment insurance benefits in the amount of \$3,033.00 as follows: \$337.00 per week for nine weeks, from benefit week ending July 30, 2005 to benefit week ending September 24, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

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 parties agree that the claimant was discharged but disagree as to the date. The employer's witness, Audrey Petersen, Controller, testified that the claimant was discharged on July 1, 2005. The claimant testified that he was discharged on July 10, 2005. Although it makes little difference here, because the claimant did not file for unemployment insurance benefits until an effective date of July 24, 2005, the administrative law judge nevertheless concludes that the claimant was discharged on July 1, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is

disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, but not including excessive unexcused absenteeism. The employer's witness, Audrey Petersen, Controller, testified that the claimant was discharged for two reasons, poor attendance and personal addictions and lifestyle arising out of the use of marijuana and the arrest therefore and the conviction for operating a motor vehicle while under the influence of marijuana.

Concerning the attendance issues, Ms. Petersen testified that the claimant was absent fifty percent of the potential work after being released from the hospital in April or May of 2005. The claimant conceded that he was absent on those occasions but testified that he was absent because of personal illness related to an allergy condition. Ms. Petersen had no firm evidence to the contrary. Ms. Petersen testified that she did not believe the claimant had properly reported these absences but the claimant testified forthrightly that he had properly reported all of his absences. The administrative law judge is constrained to conclude on the record here that there is not a preponderance of the evidence that the claimant's absences were not for personal illness or reasonable cause and not properly reported. Therefore, the administrative law judge is constrained to conclude that the claimant's absences were not excessive unexcused absenteeism and not disqualifying misconduct.

The other reason given for the claimant's discharge by Ms. Petersen was personal addiction and lifestyle arising out of an incident on June 9, 2005 involving marijuana. The evidence establishes that on June 9, 2005, while during his lunch break, the claimant was arrested for driving while barred. The police officer searched the claimant's vehicle incident to an arrest and detected a strong odor of burnt marijuana in the car. The police officer found pieces of plant material believed to be marijuana on the front seat and more such plant material in a canister in the glove box. The officer also found under the driver's seat an orange plastic bong containing what the officer believed to be burnt marijuana. The claimant admitted that the marijuana was his and admitted further to smoking it, but claimed that he smoked it in the car last night. However, the police officer informed the employer that because of the strong odor, the marijuana must have been smoked in the morning of June 9, 2005. The claimant worked the morning of June 9, 2005 and the marijuana was discovered while the claimant was on his lunch break. The claimant testified that as a result of a plea bargain he pled guilty to operating a motor vehicle while under the influence of marijuana. The claimant conceded that he had smoked marijuana, but testified that he did so the night before. The claimant conceded that he went to work in the morning. The employer has policies as shown at Employer's Exhibit 2, prohibiting reporting to work under the influence of alcohol or an illegal narcotic or bringing alcohol or an illegal narcotic on the company premises. The administrative law judge is constrained to conclude that the claimant has violated that policy. The administrative law judge believes on the evidence, that the claimant smoked the marijuana in the morning of June 9, 2005, which was either immediately before or at some time during his work on June 9, 2005 or perhaps during his lunch break. The administrative law judge concludes that this violates the employer's policy. Even assuming that the claimant smoked the marijuana the night before, the administrative law judge would conclude that the claimant still violated the employer's policy because the administrative law judge is not convinced that one can get over the effects of the smoking of marijuana in a few hours overnight. Finally, the evidence establishes that marijuana was found in the claimant's vehicle and he had reported to work in the vehicle in the morning of June 9, 2005, and this clearly violates the employer's policies. Accordingly, the administrative law judge concludes that this incident with the marijuana was a deliberate act or omission by

the claimant constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evinces a willful or wanton disregard of the employer's interests and, at the very least, is carelessness or negligence of such a degree of recurrence, all as to establish disqualifying misconduct. The administrative law judge notes that the claimant was given a warning previously concerning coming to work with alcohol on his breath. The claimant denies coming to work with alcohol on his breath but concedes to the warning. The claimant was on notice that he needed to conduct himself properly when he came to work, even if he did not have alcohol on his breath at the time.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$3,033.00 since separating from the employer herein on or about July 1, 2005 and filing for such benefits effective July 24, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions with Iowa law.

DECISION:

The representative's decision of August 19, 2005, reference 01, is reversed. The claimant, Jay D. Bettin, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. He has been overpaid unemployment insurance benefits in the amount of \$3,033.00.

dj/kjw