BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

DINA M HANZELKA	:	
	:	**HEARING NUMBER:** 11B-UI-02022
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
CASEYS MARKETING COMPANY	:	
Employer.		

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Dina Hanzelka (Claimant) worked for Casey's marketing Company (Employer), most recently as a part-time pizza maker/clerk, from June 29, 2009 until she was fired on August 13, 2010. (Tran at p. 2; p. 6; Ex. 1). The Claimant was on a leave of absence due to medical issues from August 3 through 8, 2010. (Tran at p. 9; p. 14-17; p. 24-25; Ex. A). The Employer found what it claims to be marijuana in the kitchen on August 4 or 5, 2010. (Tran at p. 2; p. 5; p. 6-7).

The Claimant was not scheduled to work on August 10. (Tran at p. 17). The Employer notified her, however, that she must attend a mandatory meeting to be tested. (Tran at p. 17). The Claimant reported for the mandatory meeting on August 10, 2010. (Tran at p. 17; p. 20). Employees were given a copy of the drug and alcohol testing policy and told if the person who left the alleged marijuana in the kitchen did not

step forward, the store employees would be tested. (Tran at p. 14; p. 17). No one stepped forward, so the Employer tested a number of the employees at that store. (Tran at p. 5; p. 14; p. 17). The drug screen sample was taken on August 10, 2010. (Tran at p. 5; p. 17-18; p. 20).

Although a split sample was collected, the Employer did not notify the Claimant what it would cost to test the split sample. (Tran at p. 19-20). The Employer terminated the Claimant based on the results of the test. (Tran at p. 2). The Claimant did not request a split sample test or otherwise contest the low-level results because of the cost. (Tran at p. 19).

REASONING AND CONCLUSIONS OF LAW:

Misconduct in General: Iowa Code Section 96.5(2)(a) (2011) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
>
> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects 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 substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

Grounds for Testing: We have no doubt that bringing marijuana to work, or using illegal drugs contrary to policy, would be misconduct. But the Iowa Supreme Court has ruled that an employer cannot establish disqualifying misconduct based solely on a drug test performed in violation of Iowa's drug testing laws. *Harrison v. Employment Appeal Board*, 659 N.W.2d 581 (Iowa 2003); *Eaton v. Employment Appeal Board,* 602 N.W.2d 553, 558 (Iowa 1999). The Court in *Eaton* stated, "It would be contrary to the spirit of chapter 730 to allow an employer to benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." *Eaton*, 602 N.W.2d at 558. In recognition of the importance of drug testing compliance in unemployment cases the Code allows the test result to be considered in unemployment cases even though generally the results are to be confidential. Iowa Code §730.5(13)(d)(1)

An employee in Iowa may be subjected to a mandatory drug test only upon certain specified conditions. Possibly relevant here are:

> 8. Drug or alcohol testing. Employers may conduct drug or alcohol testing as provided in this subsection:
>
> a. Employers may conduct unannounced drug or alcohol testing of employees who are selected from any of the following pools of employees:
>
> (1) The entire employee population at a particular work site of the employer except for employees not subject to testing pursuant to a collective bargaining agreement, or employees who are not scheduled to be at work at the time the testing is conducted because of the status of the employees or who have been excused from work pursuant to the employer's work policy prior to the time the testing is announced to employees.
>
> (2) The entire full-time active employee population at a particular work site except for employees not subject to testing pursuant to a collective bargaining agreement, or employees who are not scheduled to be at work at the time the testing is to be conducted because of the status of the employee or who have been excused from work pursuant to the employer's working policy.
>
> (3) All employees at a particular work site who are in a pool of employees in a safety-sensitive position and who are scheduled to be at work at the time testing is conducted, other than employees not subject to testing pursuant to a collective bargaining agreement, or employees who are not scheduled to be at work at the time the testing is to be conducted or who have been excused from work pursuant to the employer's work policy prior to the time the testing is announced to employees.
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> ....
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> c. Employers may conduct reasonable suspicion drug or alcohol testing.

Iowa Code §730.5(8). The Employer stated that the test here was based on reasonable suspicion. Iowa Code §730.5(1)"i" defines "reasonable suspicion":

> i. "Reasonable suspicion drug or alcohol testing" means drug or alcohol testing based upon evidence that an employee is using or has used alcohol or other drugs in violation of the employer's written policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. For purposes of this paragraph, facts and inferences may be based upon, but not limited to, any of the following:
>
> (1) Observable phenomena while at work such as direct observation of alcohol or drug use or abuse or of the physical symptoms or manifestations of being impaired due to alcohol or other drug use.
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> (2) Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance.
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> (3) A report of alcohol or other drug use provided by a reliable and credible source.
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> (4) Evidence that an individual has tampered with any drug or alcohol test during the individual's employment with the current employer.
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> (5) Evidence that an employee has caused an accident while at work which resulted in an injury to a person for which injury, if suffered by an employee, a record or report could be required under chapter 88, or resulted in damage to property, including to equipment, in an amount reasonably estimated at the time of the accident to exceed one thousand dollars.
>
> (6) Evidence that an employee has manufactured, sold, distributed, solicited, possessed, used, or transferred drugs while working or while on the employer's premises or while operating the employer's vehicle, machinery, or equipment.

Looking over this list we cannot find reasonable suspicion in this case. Starting with the bottom we of course have no evidence (other than what might fall under the first paragraph) that the Claimant is guilty of any of the infractions listed in division 6. There was no erratic behavior or the like as required by paragraph 2, no report of drug use as required in paragraph 3, no evidence of tampering with a prior test required in paragraph 4, and no evidence of a workplace accident as required in paragraph 5. This leaves only "observable phenomena at work" which, we suppose, might include the errant bag of marijuana. But this bag was found while the Claimant was off work – for the whole week. It was not found in some area personal to the Claimant. There was nothing tying the drug cache to the Claimant, and certainly no reasonable suspicion that the Claimant was responsible for it. Indeed, there is a good argument that suspicion of everyone equally means individualized suspicion of no one, that is, where everyone is a suspect there are no "articulable facts" for suspecting anyone in particular. But be that as it may, it is patently unreasonable to suspect someone who hadn't been there for undoubted medical reasons for the entire week when the drugs were found.

Although the Employer did test (almost) all the employees at the job site it cannot rely on "unannounced drug or alcohol testing of employees" language in Iowa Code §730.5(8)(a). First, to accomplish "unannounced drug or alcohol testing of employees" an employer must use an entity independent from the employer that then employs a computerized random-number generator to select a portion of the employees to be tested. Iowa Code §730.5(1)(l). None of this took place here. Second, the pool from which employees may be selected for such testing is not to include people off work due to their status. Here the Claimant was off work on the 10th due to a combination of her part-time status and her medical leave (in other words, she wasn't off work because she asked for vacation or called in sick that day). True, the Employer called the Claimant in for the sole purpose of testing her, but this cannot by-pass the requirement of Iowa Code §730.5(8)(a) else the provision would be meaningless. Finally, random testing is not mentioned in the Employer's policies as required by Iowa Code §730.5(9). The Employer cannot rely on the "unannounced drug or alcohol testing of employees" authorization for this reason as well.

The Employer was not authorized to administer the drug test to the Claimant and for this reason alone those results are excluded from evidence.

Notification of Retest Rights: Once a test is administered the Employer must comply with certain notice requirements. In pertinent part §730.5(7) provides:

> i. (1) If a confirmed positive test result for drugs or alcohol for a current employee is reported to the employer by the medical review officer, the employer **shall notify the employee in writing** by certified mail, return receipt requested, **of** the results of the test, the employee's right to request and obtain a confirmatory test of the second sample collected pursuant to paragraph "b" at an approved laboratory of the employee's choice, and **the fee payable by the employee to the employer for reimbursement of expenses concerning the test.** The fee charged an employee shall be an amount that represents the costs associated with conducting the second confirmatory test, which shall be consistent with the employer's cost for conducting the initial confirmatory test on an employee's sample. If the employee, in person or by certified mail, return receipt requested, requests a second confirmatory test, identifies an approved laboratory to conduct the test, and pays the employer the fee for the test within seven days from the date the employer mails by certified mail, return receipt requested, the written notice to the employee of the employee's right to request a test, a second confirmatory test shall be conducted at the laboratory chosen by the employee.

Iowa Code §730.5(7)(i)(1)(emphasis added). In *Harrison v. Employment Appeal Board,* 659 N.W.2d 581 (Iowa 2003) the Court explained that the notice "must tell the employee what the cost of that test will be…" The notice here did not do that. The Claimant was left to guess how much a retest would be, and this was why she did not request a retest. (Tran at p. 19). The failure to disclose the price of retest to the Claimant is a serious flaw, and we find that the notice was not in substantial compliance with §730.5(7)(i)(1). For this reason alone, independent of the lack of authorization for the test, the drug test result must be excluded.

Conclusion. The drug test results in this case are excluded for two independent reasons each of which is sufficient to exclude the evidence: (1) the Employer was not authorized to administer the test to the Claimant, and (2) the Claimant was not given notice that substantially complied with §730.5(7)(i)(1). We have excluded the drug test result, and thus misconduct must be proved by the remainder of the record. It isn't. There is not evidence, once the results are excluded, that the Claimant used marijuana and thus no basis for concluding she violated the Employer's policies. Even less can we find by a preponderance that the drugs found when the Claimant was off work for a week had anything to do with the Claimant. The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence. We have found credible the Claimant's denials of any drug use. Benefits are allowed.

DECISION:

The administrative law judge's decision dated April 13, 2011 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for no disqualifying reason. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

DISSENTING OPINION OF MONIQUE KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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Monique F. Kuester

RRA/fnv