

**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**

**TIMMY C MCAFEE  
772 HWY 6 E  
SEARCY AR 72143**

**ALTER BARGE LINE INC  
STE G50  
2117 STATE ST  
BETTENDORF IA 52722-1400**

**Appeal Number: 05O-UI-07183-HT  
OC: 04/25/04 R: 12  
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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Alter Barge Line, Inc. (Alter), filed an appeal from a decision dated April 14, 2005, reference 01. The decision allowed benefits to the claimant, Timmy McAfee. After due notice was issued a hearing was held by telephone conference call on August 1, 2005. The claimant participated on his own behalf. The employer participated by Marine Manager Randy Kirschbaum.

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: Timmy McAfee was employed by Alter from April 26,

2003 until October 21, 2004. He was a full-time mate aboard a marine vessel operating in the Mississippi River. At the time of hire the claimant received a copy of the employer's drug and alcohol policy which informed him he was subject to the federal regulations regarding random drug tests and other regulations according to the United States Coast Guard procedures.

Each vessel is considered one testing "pool" and is randomly selected by a third party. The third party notifies Marine Manager Randy Kirschbaum which vessel has been selected and he notifies the captain of the vessel, who then notifies the employees. The samples are taken on board by a certified technician and analyzed at a certified laboratory.

The medical review officer is to contact the individual employee if there is any positive test. The certification sent by the MRO to the employer indicated no contact was made at the telephone numbers provided by the claimant. When the employer received the certified results the report indicated the claimant had tested positive for marijuana. Federal law does not allow the employer to retain the employee in active work with a positive test result.

The claimant did not request the sample to be retested although it had been split. The federal regulations and the company policy provide that if the second test came back negative the employee will be reinstated.

Timmy McAfee has received unemployment benefits since filing an additional claim with an effective date of March 27, 2005.

#### REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes 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 claimant was properly tested under the federal regulations governing his position as a mate on a marine vessel. As his test came back positive the employer was required to remove him from duty and, under its own policies, discharge him. The claimant could have requested the split sample be retested but did not do so because he thought it would "be to no avail." He declined the opportunity to prove he did not test positive and be reinstated. The record establishes the claimant was discharged for violation of the company drug policies. Being under the influence of controlled substances while on duty jeopardizes the safety of the claimant and co-workers and is conduct not in the best interests of the employer. He is disqualified.

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 claimant has received unemployment benefits to which he is not entitled. These must be recovered in accordance with the provisions of Iowa law.

#### DECISION:

The representative's decision of April 14, 2005, reference 01, is reversed. Timmy McAfee is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount provided he is otherwise eligible. He is overpaid in the amount of \$4,920.00.

bgh/kjf