

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**TAMMY J BOWEN**  
Claimant

**APPEAL NO. 09A-UI-14929-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**AVENTURE STAFFING & PROFESSIONAL  
SERVICES LLC**  
Employer

**OC: 12/14/08**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Tammy Bowen filed a timely appeal from a representative's decision dated September 28, 2009, reference 05, which denied benefits finding the claimant was discharged from work on July 28, 2009 for violation of a known company rule. After due notice, a telephone hearing was scheduled for and held on November 4, 2009. Ms. Bowen participated personally. The employer participated by Ms. Cyd Hall, Office Manager, and Ms. Niki Heck, Clerical Manager. Claimant's Exhibits A through D were received into evidence and Employer's Exhibit One was received into evidence.

**ISSUE:**

The issue in this matter is whether the claimant was discharged for misconduct in connection with her employment sufficient to warrant the denial of unemployment insurance benefits.

**FINDINGS OF FACT:**

The administrative law judge, having considered the evidence in the record, finds: Tammy Bowen began accepting employment through Adventure Staffing on March 2, 2009 and was issued a company handbook explaining the company's policies and expectations. Ms. Bowen accepted an assignment as a clerical worker at the Tyson Fresh Meat facility in March 2009 and at that time underwent a drug testing to begin the assignment that was to last approximately one month. Ms. Bowen completed the assignment. Subsequently, on two other occasions, on May 21, and July 2, the claimant was assigned to work at Tyson Fresh Meats and was not required to undergo drug testing. The claimant's most recent assignment ended on July 10, 2009. At that time the claimant contacted Adventure Staffing to report that the assignment ended and to inform the employer that she was available for additional assignments. No work was available to Ms. Bowen at that time, or on the next working day. Ms. Bowen accepted other employment for a period of time with another employer. On or about July 27, the claimant was contacted by Niki Heck and told of a potential position available for one day's work at Tyson. Ms. Bowen was initially agreeable to accept the one-day assignment. When told, however, that the one-day assignment also required her to undergo another drug screen, Ms. Bowen declined the assignment indicating in effect that the requirement of another drug screening was

unreasonable for a one-day assignment. Ms. Bowen objected to giving the specimen at Tyson's corporate headquarters where she was to work. The claimant felt the requirement was obtrusive, invasive and not worthwhile for a one-day assignment. The claimant felt very uncomfortable about submitting to a urinalysis at the corporate headquarters of Tyson Fresh Meats. Because her last assignment had ended and the company had no further work at that time, the claimant did not believe she had any obligation to accept any further assignments, if she chose not to. Company literature tells prospective employees they are free to decline assignments, if they choose.

Although the claimant was not being paid and no work had been available to her at the end of her last assignment, the claimant's refusal was nonetheless considered to be a violation of the company's policies. Ms. Bowen was told that she was being "discharged" and precluded from working at Tyson or any other assignments with Adventure Staffing.

Based upon the information provided by the company that they would no longer be assigning her to any positions in the future, Ms. Bowen did not feel it was inappropriate for her to directly contact Tyson offering her services to that employer. The claimant, therefore, contacted Tyson by e:mail. When Adventure Staffing was informed of the contact, the company considered this to be another violation of its policies and a second reason for refusing to employ the claimant in the future.

It is the claimant's position that as the employment relationship had ended at the completion of her most recent assignment she had no obligation to accept any future assignments with the company and believed based upon the statements in the company handbook that a refusal would not preclude her from other future assignments. Ms. Bowen had no objection to the purpose of the drug screening but only to the manner that it was to be administered at the corporate headquarters as well as the repetitive nature of the testing for short-term temporary assignments.

#### **REASONING AND CONCLUSIONS OF LAW:**

The question before the administrative law judge is whether the evidence in the record establishes that the claimant was separated for misconduct sufficient to warrant the denial of unemployment insurance benefits. It does 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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify the denial of unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

Iowa Code section 730.5 provides and limits the authority under which a private sector employer doing business in Iowa may conduct drug or alcohol testing of employees. In Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553 (Iowa 1999), the Supreme Court of Iowa considered the statute and held "that an illegal drug test cannot provide the basis to render an employee ineligible for unemployment insurance benefits." Thereafter in Harrison v. Employment Appeal Board, 659 NW 2d 581 (Iowa 2003), the Iowa Supreme Court held that when an employer had not complied with the statutory provisions their testing could not serve as the basis for disqualifying a claimant for benefits.

Iowa Code section 730.5(9)(a) requires that drug testing be carried out "within the terms of a written policy." The test requested by the employer in this case was not carried out within the terms of the employer's written policy. The written policy called for every employee that is being offered employment to submit to a pre-employment drug test. (Employer's Exhibit A). The evidence in the record establishes that Ms. Bowen had initially undergone drug testing but had not been required to do so on at least two other occasions when being assigned to this client employer by Aventure Staffing. The employer did not uniformly apply the drug testing policy. The claimant's refusal to be tested therefore, cannot serve as a basis for disqualifying Ms. Bowen from unemployment insurance benefits.

871 IAC 24.1(113)a provides:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs. A layoff is a suspension from pay status (lasting or expected to last more than seven consecutive calendar days without pay) initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

In addition, the evidence in the record shows that the claimant had previously completed her most recent assignment through Aventure Staffing and the claimant complied with notifying the employer that the assignment had ended. There was no work available for the claimant on the next working day or for a substantial period thereafter. The claimant's separation was due to lack of work, not due to intentional disqualifying misconduct.

Based upon the facts of this case and the application of applicable law, the administrative law judge concludes that the claimant's separation was for no disqualifying reason.

**DECISION:**

The representative's decision dated September 28, 2009, reference 05, is reversed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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