

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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DUBUQUE IA 52003

EAGLE WINDOW & DOOR INC
ATTN AMY TURNER
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AMENDED

Appeal Number: 06A-UI-03268-H2T
OC: 03-27-05 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
Section 96.6-2 - Timeliness of Protest

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 13, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 11, 2006. The claimant did participate. The employer did participate through Amy Turner, Human Resources Representative. Employer's Exhibit One was received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a material handler full time beginning July 1, 1991 through September 23, 2005 when he was discharged.

The claimant's notice of claim was mailed to the employer's address of record on September 21, 2005, indicating that the claimant had filed for benefits during a temporary layoff. The claimant was indeed laid off from the employer from September 18, 2005 through September 23, when he was discharged for failing a drug test. The employer was never notified that the claimant was continuing to file for unemployment insurance benefits after the employer discharged the claimant. At hearing, the claimant admitted he did not notify his local workforce office that his status had changed from temporary layoff to a discharge. Had the claimant made the proper notification another notice of protest form would have been mailed to the employer allowing them to protest charges for the discharge separation. The employer contacted the Agency within 30 days of the mailing of their statement of charges. The employer's protest was filed on March 9, 2006.

The claimant sustained a work-related eye injury on September 13. He asked for and was given medical treatment by the employer. The claimant was sent first to a local clinic and then to Mercy Hospital. The employer's drug and alcohol policy, a copy of which had been given to the claimant, provided for drug tests after work-related accidents that required medical treatment or were OSHA reportable. The claimant's drug test came back positive for marijuana use. The claimant was notified by certified mail of his ability to have the split sample tested at his own cost. At hearing, the claimant admitted he had received the employer's drug and alcohol policy and that he had smoked marijuana the night before the work-related injury on September 13. The claimant was not tested to insure compliance with any federal statute or regulation.

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

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6-2 provides in pertinent part:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant.

The administrative law judge concludes that the employer filed its protest within the time period prescribed by the Iowa Employment Security Law because it was not notified of a new or continuing claim after the claimant was discharged. When the employer received the statement of charges, its first indication the claimant was claiming or receiving unemployment insurance benefits since the discharge, it notified the Agency of its intent to protest the charges. Had the claimant properly notified Iowa Workforce Development about the change in his status, a new notice of protest would have been generated. This is sufficient evidence of intent to protest any potential charges to their account.

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 met the requirements of Iowa Code section 730.5. The employer's policy requires the claimant to be drug free. The claimant was given a copy of the employer's drug and alcohol testing policy. He knew or should have known that smoking marijuana is illegal. A claimant discharged due to possession of a lit marijuana cigarette is guilty of misconduct because the actions are a violation of criminal law. Kehde v Iowa Department of Job Service, 318 N.W.2d 202 (Iowa 1979). Smoking marijuana, even during non-work hours, is a criminal action and constitutes disqualifying misconduct. See, Kleidosty v. EAB, 482 N.W.2d 416, 418 (Iowa 1992) and Diggs v. EAB, 478 N.W.2d 432 (Iowa App. 1991). 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 March 13, 2006, reference 01, decision is reversed. The employer has filed a timely protest. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant is overpaid benefits in the amount of \$7,173.00.

tkh/kkf/tjc