

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

ALFONSO G TORRES
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SIOUX CITY IA 51106

SINCLAIR OIL CORPORATION
c/o TALX UCM SERVICES INC
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-06578-JTT
OC: 06/05/05 R: 01
Claimant: Appellant (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
Section 730.5 – Drug Test

STATEMENT OF THE CASE:

Alfonso Torres filed a timely appeal from the June 20, 2005, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on July 11, 2005. Mr. Torres participated. Human Resources Manager Robert Watson represented the employer and presented additional testimony through Area Retail Supervisor Robert Leazenby. Exhibits One through Five were received into evidence.

FINDINGS OF FACT:

Alfonso Torres was employed by Sinclair Oil as a full-time service station manager from August 27, 2003 until June 2, 2005, when Area Retail Supervisor Robert Leazenby discharged him for misconduct based on a positive random drug screen.

Sinclair Oil has a written drug/alcohol testing policy, which the employer characterizes as a zero-tolerance policy. Under the policy, an employee who provides a body specimen that tests positive for controlled substances is subject to disciplinary action up to and includes termination of employment. The employer applies the policy by terminating all employees who test positive, unless the test result was caused by something beyond the employee's control. The employer's policy includes provisions for pre-employment screening, reasonable suspicion screening, and random screening. The random selection is made by an independent entity that runs a computer-based random generation process. The employer has several pools of employees for purposes of random testing. Mr. Torres was in the random testing pool that included all of Sinclair Oil's retail convenience store personnel.

Mr. Torres was aware that his employment subjected him to random drug screening, and had acknowledged in writing the employer's drug testing policy in August 2003. In addition, Mr. Torres, as the store manager, was responsible for facilitating drug screening of employees who worked at the service station. The drug testing policy was posted at the service station.

On May 31, 2005, Mr. Torres was randomly selected to provide a body specimen for drug screening. During his scheduled work period, Mr. Torres learned that he had been selected for random screening and reported to Mercy Business Health for collection of the sample.

The Mercy Business Health employee who collected the sample made errors in documenting the sample collection and may have made errors in collecting the sample itself. On the specimen collection form, the collector marked that the purpose of the test was "Pre-employment," when this was not the case. The collector also marked that the specimen was collected as a single sample, rather than a split-sample. The "test results report" prepared by Northwest Toxicology also indicates that the reason for the test was "Pre-Employment." The employer speculates that these documentation errors may be attributable to a recent revision of the form Sinclair Oil uses for the testing.

The sample attributed to Mr. Torres tested positive for cannabinoids on the preliminary screen, and was forwarded to Northwest Toxicology for confirmation testing. The sample was received on June 1, 2005. On June 2, Northwest Toxicology submitted a report to the medical review officer that confirmed the urine sample was positive for cannabinoids. Under the employer's policy, the threshold for a positive test is 15 ng/mL. This threshold is based on the threshold utilized by the United States Department of Transportation. The tested specimen indicated a cannabinoid level of 25 ng/mL. The medical review officer forwarded the test result information to the human resources department. Mr. Watson advised Mr. Leazenby of the positive test result, who in turn notified Mr. Torres.

Mr. Torres contacted Mr. Watson to discuss the test result. Mr. Torres advised Mr. Watson that he thought the positive test result was from secondary hand smoke. Mr. Torres' explained that he had been exposed to individuals who were smoking marijuana on the night of his bachelor party. Mr. Torres' indicated that he had become very intoxicated, had fallen asleep at approximately 4:00 a.m., and that others around him had been smoking marijuana. The employer's medical review officer had previously advised Mr. Watson that the only means by which a person could have a positive test result for cannabinoids based on second-hand smoke inhalation was if the person were in a very small, completely sealed space where there was heavy substance use. In other words, in the opinion of the medical review officer and the employer, such an explanation for a positive test result is not plausible.

Mr. Torres advised Mr. Watson that he had had previously submitted to drug testing in the course of his employment and had never provided a positive drug screen. Mr. Torres asked to have the sample retested. Mr. Watson advised Mr. Torres that he could have a second testing of the sample at Mr. Torres' expense and by a certified lab of his choosing. Mr. Watson advised Mr. Torres that

the original sample, not a new sample, would be tested. The employer mailed a copy of the drug test result to Mr. Torres via certified mail.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Torres was discharged for misconduct in connection with his employment.

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).

Since the claimant was discharged, 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 a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment 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. App. 1992).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4).

Courts are to construe the provisions of the unemployment compensation law liberally, and to interpret the unemployment compensation law's disqualification provisions strictly, to further the

purpose of the law. See Bridgestone/Firestone, Inc. v. Employment Appeal Bd., 570 N.W.2d 85 (Iowa 1997)

Private sector employee drug testing is authorized by Iowa statute. See Iowa Code section 730.5. The statute that authorizes the testing also imposes a number of rules for the testing to which the employer must adhere. One such rule requires that a urine specimen be collected as a split sample so that part of the specimen is available to the employee for a second test. See Iowa Code section 730.5(7)(b).

The employer did not offer testimony from any of the health care professionals who participated in the collection or processing of the urine specimen.

The Mercy Business Health employee who collected a urine sample from Mr. Torres and forwarded a urine sample to Northwest Toxicology for further testing made at least one error in documenting the collection of the sample from Mr. Torres. The documentation indicates the specimen was collected as part of a pre-employment screening. If this were the only error on the documentation, it would be of minimal significance. However, the documentation of the collection of the sample further indicates that the collector either erroneously documented the sample as a single sample when it was actually collected as a split sample, or erroneously collected the specimen as a single sample when it should have been collected as a split sample. On the one hand, if the collector's error was in recording the sample as a single sample, this is the second discernible error in the documentation, and raises the possibility of additional errors. On the other hand, if the collector's error was in collecting the specimen as a single sample instead of a split sample, then the specimen collection did not comply with the requirements of Iowa Code section 730.5(7)(b). The effect of such an error would be to deny Mr. Torres the right to have the specimen retested because there would be nothing to test. Such an error also raises the possibility of additional errors. Based on possible errors in collection of the specimen and discernible errors in the documentation of the collection of the specimen, the administrative law judge concludes that the test result is unreliable.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the employer has failed to sufficiently corroborate the allegation of misconduct and that Mr. Torres was, therefore, discharged for no disqualifying reason. Accordingly, Mr. Torres is eligible for benefits, provided he is otherwise eligible.

DECISION:

The Agency representative's decision dated June 20, 2005, reference 01, is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible.

jt/sc