

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LINDSEY N BEAN
Claimant

APPEAL NO: 10A-UI-14241-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KUM & GO LC
Employer

OC: 08/15/10
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Kum & Go, L.C. (employer) appealed a representative's October 8, 2010 decision (reference 01) that concluded Lindsey N. Bean (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 30, 2010. The claimant participated in the hearing and presented testimony from one other witness, Lonna Dameron. Mike Jones appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on January 17, 2005. She worked full time as sales manager of the employer's Mediapolis, Iowa store. Her last day of work was August 15, 2010. The employer discharged her on August 14, 2010. The reason asserted for the discharge was failing a random drug test.

On August 10 the claimant was selected for and submitted to a random drug test. The employer did not have information regarding the details of the selection or collection process, including the costs. On or about August 13 the employer received a report that the test had come back as positive for marijuana. The area manager directed that the claimant be removed from the employee system.

On August 14 the claimant was scheduled to work beginning at 4:00 a.m. and reported for work as scheduled; she discovered she could not clock in, that the system showed her status as discharged. The claimant contacted the area supervisor directly and inquired about the situation; he responded that he had planned to tell her directly that she was discharged due to the positive test being a violation of the employer's policies. When she explained she was scheduled to work that day and the next and that the store manager was unavailable to cover

for her and asked what she was to do, he instructed her to continue to work the two days and to operate the register logged in as another employee, which she did.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a; 871 IAC 24.32(1)a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

The reason cited by the employer for discharging the claimant is violation of the employer's drug and alcohol policy through a positive drug test. In order for a violation of an employer's drug or alcohol policy by a positive drug or alcohol test to be disqualifying misconduct, it must be based on a test performed in compliance with Iowa's drug and alcohol testing laws. Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003); Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553, 558 (Iowa 1999). The Eaton court said, "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. It is the employer's burden to establish that it has complied with all of the drug testing requirements, including aspects of selection, collection, and notification of a right to have a split portion tested at a cost comparable to that paid by the employer. The employer has not substantially complied with the drug testing regulations. Furthermore, by allowing the claimant to continue working after determining she should be discharged for violating the employer's policy, the employer effectively acquiesced in the behavior or at least undermined its position that the discharge was for substantial misconduct. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's October 8, 2010 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs