

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KEVIN R ROSE**  
Claimant

**APPEAL NO. 09A-UI-17514-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FOCUS SERVICES INC**  
Employer

**Original Claim: 10/18/09  
Claimant: Appellant (2)**

Section 96.5-2-a – Misconduct

**STATEMENT OF THE CASE:**

The claimant filed an appeal from a representative's decision dated November 10, 2009, reference 02, which held the claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on December 28, 2009. The claimant participated. The claimant was represented by Andre Harrison, attorney at law. The employer participated by Dawn Kaffenberger, trainer. The record consists of the testimony of Kevin Rose and the testimony of Dawn Kaffenberger.

**ISSUE:**

Whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer in this case is the successor to APAC. The claimant held a variety of jobs over the sixteen years that he was employed by first APAC and then the current employer, Focus Services. He was a trainer and facilitator at the time of his termination on October 19, 2009.

On October 19, 2009, the employer asked the claimant to take a drug test. A call or calls had been received by the corporate office saying that there had been drug use and sales on the premises. The employer decided to test the claimant since he was one of the individuals allegedly involved. The employer wanted to make sure it had a good corporate image and that it was addressing these types of complaints.

The claimant thought he had the right to request that his drug test be done at a third-party facility. The employer had a certified drug tester on site and wanted to do the test there. The employer did have a written policy concerning drug testing, but the policy was available online and the claimant could not access it. The employer refused to allow the claimant to have a test

done at an independent facility and the claimant would not take the test on site. The claimant was considered by the employer to have resigned due to his refusal to take an onsite drug test.

**REASONING AND CONCLUSIONS OF LAW:**

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Insubordination, the continue failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). The failure to perform a specific task does not constitute misconduct if the failure is in good faith or for good cause. See Woods v. IDJS, 327 N.W.2d 768 (Iowa App. 1982)

Under Iowa Code § 730.5(8), an employee in Iowa may be subjected to a mandatory drug test only upon certain specified conditions:

8. Drug or alcohol testing. Employers may conduct drug or alcohol testing as provided in this subsection:

...

c. Employers may conduct reasonable suspicion drug or alcohol testing.

Iowa Code § 730.5(1)"i" defines "reasonable suspicion":

i. "Reasonable suspicion drug or alcohol testing" means drug or alcohol testing based upon evidence that an employee is using or has used alcohol or other drugs in violation of the employer's written policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. For purposes of this paragraph, facts and inferences may be based upon, but not limited to, any of the following:

(1) Observable phenomena while at work such as direct observation of alcohol or drug use or abuse or of the physical symptoms or manifestations of being impaired due to alcohol or other drug use.

(2) Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance.

(3) A report of alcohol or other drug use provided by a reliable and credible source.

(4) Evidence that an individual has tampered with any drug or alcohol test during the individual's employment with the current employer.

(5) Evidence that an employee has caused an accident while at work which resulted in an injury to a person for which injury, if suffered by an employee, a record or report could be required under chapter 88, or resulted in damage to property, including to equipment, in an amount reasonably estimated at the time of the accident to exceed one thousand dollars.

(6) Evidence that an employee has manufactured, sold, distributed, solicited, possessed, used, or transferred drugs while working or while on the employer's premises or while operating the employer's vehicle, machinery, or equipment.

What triggered the request for a drug test in this case was a call or calls from an unidentified individual or individuals to the employer that the claimant had been seen selling and using marijuana. Who made this call or calls and when was not known by the employer's witness. Exactly what was said in these calls is not known. The statute requires that information on drug use must come from a reliable and credible source. This requirement cannot be met by anonymous phone calls.

The employer also tries to justify the drug test by stating that all employees are subject to random testing. The claimant was not tested randomly. He had been specifically targeted for a test because the employer wanted to put to rest some rumors, founded or unfounded, about drug use at its facilities.

The administrative law judge concludes that the Employer did not have reasonable suspicion for its drug test. The Claimant therefore could not have been legally required to have undergone the test. His refusal to take an onsite drug test was a refusal to undergo an illegal test and cannot be misconduct under Iowa's law.

**DECISION:**

The representative's decision dated November 10, 2009, reference 02, is reversed. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/kjw