

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JENNIFER A PICKETT
Claimant

APPEAL NO. 14A-UI-12425-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMERISTAR CASINO CO BLUFFS INC
Employer

OC: 11/02/14
Claimant: Appellant (2)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The claimant filed a timely appeal from a representative's decision dated November 21, 2014 (reference 01) which denied unemployment insurance benefits, finding that the claimant was discharged from work on October 30, 2014 for violation of a known company rule. The hearing date on this appeal was delayed due to discovery proceedings on behalf of Ms. Pickett. Prior to the hearing date, the employer stated in writing that they were withdrawing their participation in the appeal. Subsequently, a motion was made by the claimant's attorney, Mr. Tulis, to deny the employer an opportunity to present evidence in this matter; based upon their failure to comply with the discovery. Because the employer had already indicated in writing that they would not be participating in the appeal hearing, it was concluded that an order barring the employer was unnecessary. After due notice was provided, a telephone hearing was held on February 11, 2015. Claimant participated. Participating on behalf of the claimant was Mr. Michael Tulis, Attorney with Iowa Legal Aid. Participating as a witness for the claimant was Mr. Dilbert Mitchell, the claimant's boyfriend. Although duly notified of the hearing, the employer did not participate. Claimant's Exhibits A and B were admitted into evidence.

ISSUE:

At issue is whether the evidence in the record establishes intentional misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Jennifer Pickett was employed by Ameristar Casino Co Bluffs Inc. from November 15, 2007 until November 3, 2014 when she was discharged from employment. Ms. Pickett last held the position of full-time dual rate slot machine specialist/supervisor and was paid by the hour.

Ms. Pickett was discharged on November 3, 2014 when she failed a post-accident drug screen on October 23, 2014.

At approximately 3:30 p.m. on October 22, 2014 Ms. Pickett was injured at work when a cart that she was pushing up an incline upset, breaking the claimant's second toe. Ms. Pickett immediately reported the injury and was treated on site. After completing her work shift that

day, the claimant was examined by her doctor and x-rays revealed the broken toe. Ms. Pickett returned home and iced her foot while lying down. When the claimant indicated that she needed to take her regularly prescribed anti-anxiety medication, Mr. Mitchell offered to go to the couple's medicine cabinet and bring her medication to her. Ms. Pickett took the medication that Mr. Mitchell provided, believing that it was her regularly prescribed prescription. When Ms. Pickett woke up she noted that she seemed to be very groggy and Mr. Mitchell more closely looked at the medication that he had provided to the claimant. It was then determined that Mr. Mitchell had inadvertently given Ms. Pickett a hydrocodone tablet in error, without the knowledge of Ms. Pickett or Mr. Mitchell. The hydrocodone had been prescribed to Mr. Mitchell for a previous injury and had been relocated into the medicine cabinet without Mr. Mitchell's knowledge.

Prior to reporting for her next work shift, Ms. Pickett departed for work early and specifically advised her supervisor that she had inadvertently taken the medication, identifying the medication and its effect. The employer elected to allow the claimant to report to work that day but nonetheless required the claimant to undergo a drug screen a few hours later. The claimant complied with the directive. Subsequently, the claimant was contacted by an individual from the testing facility who questioned the claimant. After Ms. Pickett had fully disclosed the circumstances leading up to the drug test, the caller suggested the claimant obtain a prescription for hydrocodone and "back date." Ms. Pickett was unwilling to engage in any falsification.

In an effort to ensure that her employer fully understood the circumstance that led to her non-intentional ingestion of the controlled substance, Ms. Pickett contacted numerous individuals in upper management to explain what had taken place.

Although the claimant had never been warned or counseled about any infractions of company policy during that time that she was employed by Ameristar Casino Co Bluffs Inc. and the claimant had been reassured that the employer would treat her fairly in the matter, the claimant was informed that she was being discharged from employment because of the company's zero tolerance policy on drug testing.

The claimant was not informed of the positive test results by her employer. The claimant was informed of the positive test results by a letter sent regular mail by the occupational health test facility.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes that the claimant was discharged from her employment by engaging in intentional misconduct in connection with her work. It does not.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv., 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing job disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating the claimant but whether the claimant is entitled to unemployment insurance benefits. Infante v. Iowa Department of Job Service, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants the denial unemployment insurance benefits are two separate decisions. Pierce v. Iowa Department of Job Service, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant a discharge, may not necessarily be serious enough to warrant a denial of unemployment insurance benefits. Such misconduct must be "substantial." When based upon carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

Iowa Code Section 730.5 provides 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 a basis to render an employee ineligible for unemployment compensation benefits." Thereafter, in Harrison v. Iowa Employment Appeal Board, 659 NW 2d 581 (Iowa 2003) the Iowa Supreme Court held that were an employer had not complied with the statutory requirements for the drug test, the test could not serve as a basis for disqualifying a claimant for benefits.

In the present case, the evidence establishes that the claimant inadvertently ingested a hydrocodone tablet in the belief that she was taking her regular medication that had been prescribed for her. Mr. Mitchell, who was assisting the claimant because she had injured her foot, accidentally took the hydrocodone tablet from the wrong prescription vial in the couple's medicine chest; believing that it was the claimant's medication instead of his own. After she

became aware of what had occurred, the claimant immediately reported what had taken place to her supervisor before her next work shift began. The employer had the option of not letting the claimant report to work under the circumstances but elected to have the claimant work and then have the claimant undergo a drug screen and, subsequently, discharge the claimant for failing the drug test.

Based upon the evidence in the record, the administrative law judge concludes that the claimant did not intentionally ingest any controlled substances that would have caused the claimant to fail the employer's drug screen and that the claimant fully disclosed the extenuating circumstances before the employer elected to have the claimant report for work after the disclosure. The administrative law judge concludes that the claimant's violation of the employer's drug policy was not intentional.

The evidence in the record further establishes that the employer's drug testing was not authorized by law and cannot serve as a basis for disqualifying Ms. Pickett for unemployment insurance benefits. The notification provisions of Iowa Code Section 730.5 require that if a confirmed positive test result is received by the employer, the employer must notify the employee of the positive test results by certified mail, return receipt requested, and the right to request or obtain a confirmatory test of the secondary sample. The administrative record establishes that claimant was not notified of the positive test results by the employer and that the notification by the testing facility was not by certified mail, return receipt requested.

For the reasons stated herein, the administrative law judge concludes that the claimant's discharge took place under non-disqualifying conditions and the claimant is eligible to receive unemployment insurance benefits for the weeks claimed, providing that she meets all other eligibility requirements of Iowa law.

DECISION:

The representative's decision dated November 21, 2014 (reference 01) is reversed. The claimant was discharged due to non-disqualifying conditions. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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