

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VICKI R YOUNGREN
Claimant

APPEAL NO. 07A-UCFE-00020-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

US POSTAL SERVICE
Employer

**OC: 03/25/07 R: 03
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge
Section 96.5-1-a – Voluntary Quit to Accept Other Employment

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated April 18, 2007, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on May 16, 2007. The parties were properly notified about the hearing. The claimant participated in the hearing. Caroline Romore participated in the hearing on behalf of the employer with a witness, Dawn Baber.

ISSUE:

Was the claimant discharged for work-connected misconduct?

Did the claimant voluntarily quit employment to accept another job and is the employer exempt from charges on this basis?

FINDINGS OF FACT:

The claimant worked for the United States Postal Service from September 2003 to July 2006, when she left employment to accept full-time employment with Osceola Foods.

The claimant went through preemployment orientation for a career mail handler position on March 13, 2007. She was informed and understood that she was required to submit a preemployment drug test and that her appointment with the United States Post Service was contingent on the results of the test. The statement signed by the claimant on that day stated that disqualifying results from the preemployment drug test would result in immediate termination of her postal employment.

Under the United States Postal Service procedures, only applicants determined to be drug-free as a result of a urinalysis are eligible to be considered for selection for a job with the Postal Service. The procedures provide that testing is to determine whether the applicant has unlawfully used drugs. The claimant was required to undergo drug testing, even though she was a former employee, because she had been separated from employment for more than 90 days. Under the drug testing procedures, if a specimen tests positive for an illegal drug, the

donor will be given an opportunity to discuss the result with a Postal Service medical review officer during which the donor can provide information (including information about drug prescriptions) to explain the test result.

The claimant provided a urine sample at a medical clinic on March 14, 2007. She told the nurses at the clinic that she was taking medications for migraines. Her urine sample was sent to a federally-certified laboratory, which tested the sample under the Postal Service procedures using an initial immunoassay test; and because the sample tested positive, a confirmatory gas chromatography/mass spectrometry test. The results of the test were positive for marijuana. The medical review officer called the claimant once on March 21, 2006, when the claimant was at work. He left a message, "Vicki Youngren, I need to talk to you," and left a phone number on her answering machine, but he did not identify himself or explain the purpose of the call. The claimant did not return the call because she did not know what the call was about.

The claimant was allowed to work before the drug test results came back. She worked from March 19 to 22, 2007. She was discharged on March 22, 2007, for failing to meet Postal Service drug test qualification requirements. She was not told what drug she had tested positive for at the time of her dismissal. On March 26, the claimant called the medical review officer. During this phone call, he informed her for the first time that she had tested positive for marijuana. When she insisted that she did not use marijuana, the medical review officer responded that she did not have to use marijuana, she could test positive if she was around people who used marijuana. The claimant had not used marijuana before she was tested on March 14, 2007.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance 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.

The Iowa Supreme Court has ruled that an employer cannot establish disqualifying misconduct based on a drug test performed in violation of Iowa's drug testing laws. Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003); Eaton v. Employment Appeal Board, 602 N.W.2d 553, 558 (Iowa 1999). As the court in Eaton stated, "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.

Iowa's private sector drug testing laws, however, do not apply to the United States Postal Service, which is excluded from the definition of an "Employer" under the law. Iowa Code § 730.5-1-e. Although the court has not addressed this issue, it is logical that the courts would require compliance with the United States Postal Service procedures before disqualifying a claimant who was discharged for failing a drug test required by those procedures.

I have researched the United States Postal Service regulations found in the Code of Federal Regulations and have not found any published rules on drug testing of applicants. The United States Postal Service does have a published Handbook, EL-312 (Exhibit 4), that provides that applicants must be determined drug free through a drug test urinalysis to be considered for selection to a position and are disqualified from consideration for employment if they fail the drug test.

The employer also provided the "Information and Instructions for Donors" document (Exhibit 1) that sets forth the testing procedures. The procedures state that the applicants are to be "tested to determine whether the applicant has unlawfully used marijuana, cocaine, amphetamines, opiates, or phencyclidine." These instructions also provide the donor "will be given an opportunity to discuss the result with a Postal Service medical review officer" and during the discussion, the donor "may provide information to explain the test result," including information about any prescriptions that the donor might be lawfully taking.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established. First, while the evidence establishes the sample was properly tested under the United States Postal Services procedures, the evidence fails to establish that the claimant was given an opportunity to discuss the result with a Postal Service medical review officer before she was discharged. The message left by the medical review officer did not give the claimant a reasonable opportunity to discuss the test results. Second, the positive test result does not prove the

claimant committed work-connected misconduct in this case, based on the claimant's testimony that she never used drugs before taking the test and the medical review officer's statement that she could test positive without using marijuana. The employer provided no contrary evidence. If the claimant committed work-connected misconduct regarding the drug test, it would have to be based on her using illegal drugs. This has not been proven by the preponderance of the evidence.

Finally, I identified during the hearing that there were two separations from employer in this case and the parties agreed that I could make a determination on both separations. The first one occurred in July 2006 and the second on March 22, 2007. Charges to employer are actually based on the claimant's first separation, which was a voluntary quit for other employment.

Iowa Code § 96.5-1-a provides that a claimant who leaves employment to accept other employment and works in that employment is qualified to receive unemployment benefits. Although the statute provides that contributing and reimbursing employers are not charged for benefits paid under this statute, that provision does not apply to benefits paid based on wages reported under the unemployment compensation for federal employees (UCFE) program. Charges to the employer will be determined pursuant to 20 CFR 609.14, which is the rule for charges under the UCFE program. The exemption from charge provisions do not apply to federal employers.

DECISION:

The unemployment insurance decision dated April 18, 2007, reference 01, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible. Charges to the employer will be determined pursuant to 20 CFR 609.14.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/kjw