

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

BRAD A BABBERL
625 N JEFFERSON
OTTUMWA IA 52501

KUM & GO LC
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-08469-DT
OC: 07/10/05 R: 03
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Kum & Go, L.C. (employer) appealed a representative's August 3, 2005 decision (reference 01) that concluded Brad A. Babberl (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 September 1, 2005. The claimant failed to respond to the hearing notice and provide a telephone number at which he could be reached for the hearing and did not participate in the hearing. Karen Thompson appeared on the employer's behalf. During the hearing, Employer's Exhibits One, Two, and Three were entered into evidence. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

FINDINGS OF FACT:

The claimant started working for the employer on April 12, 2004. He worked part time (30 hours per week) as a sales associate in the employer's Ottumwa, Iowa convenience store. His last day of work was July 7, 2005. The employer discharged him on that date. The reason asserted for the discharge was failing a drug test.

On or about June 27, 2005 the employer discovered that the store had a shortage of cash and inventory. As a result, the employer referred the entire store employee population, numbering between eight and ten, to the employer's independent random selection service provider. Ninety percent of the store population was then informed that they were subject to a random drug test.

The employer's policies of which the claimant was on notice, provide that discharge will occur upon a first positive drug test. The claimant was informed on June 30, 2005 that he had been selected for a random drug test from the store's "pool." He was taken to a local clinic for collection of a urine sample. Information was not provided as far as the collection sanitary and privacy provisions, although the employer understood that there had been a split sample taken. On July 7, 2005, the testing facility contacted the employer by phone to indicate that the test had been positive for marijuana. Information was not provided to establish what type of confirmatory testing process was conducted, if any. The employer then informed the claimant that he was being dismissed. On July 11, 2005 the employer sent the claimant a formal notice of termination, which also advised him of his rights to have the split sample tested at an approved laboratory of his choice. The claimant received this notice on July 13, 2005.

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 section 96.5-2-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).

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).

The reason cited by the employer for discharging the claimant is having a positive drug test result in violation of the employer's policies. Use of a controlled substance on an employee's own time can be work-connected misconduct if the employer's policies prohibit such illegal off-duty conduct. Kleidosty v. Employment Appeal Board, 482 N.W.2d 416, 418 (Iowa 1992). In order for a violation of an employer's drug or alcohol policy to be disqualifying misconduct, it must be based on a drug test performed in compliance with Iowa's drug 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.

Iowa Code §730.5 allows several specified types of drug testing, including "reasonable suspicion testing" and "unannounced testing," commonly referred to as "random testing." Iowa Code §730.5(1)(h), (k). The "unannounced" or "random testing" is defined as testing for the purposes of detecting drugs or alcohol that is conducted on a periodic basis, without advance notice of the test to employees. "The selection of employees to be tested from the pool of employees subject to testing shall be done based on a neutral and objective selection process by an entity independent from the employer and shall be made by a computer-based random number generator that is matched with employees' social security numbers, payroll identification numbers, or other comparable identifying numbers in which each member of the employee population subject to testing has an equal chance of selection for initial testing, regardless of whether the employee has been selected or tested previously. The random selection process shall be conducted through a computer program that records each selection attempt by date, time, and employee number." Iowa Code §730.5(1)(k).

Iowa Code §730.5(8)(a) provides in pertinent part:

Employers may conduct unannounced drug or alcohol testing of employees who are selected from any of the following pools of employees:

(1) The entire employee population at a particular work site of the employer except for employees who are not scheduled to be at work at the time the testing is conducted because of the status of the employees or who have been excused from work pursuant to the employer's work policy prior to the time the testing is announced to employees.

The employer's process of having ninety percent of a pool created purely as a result of a general suspicion is not selection resulting from a "neutral and objective selection process." The claimant's selection for testing does not meet the requirements of "random" selection as provided by the statute. Neither does his selection fall within the requirements of "reasonable suspicion" testing which require that selection for such testing be "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." Iowa Code §730.5(1)(h). The facts to be observed are to be specific to an individual employee; a generalized concern that if there is a shortage of cash or inventory in a store that one of the employees might be consuming illegal drugs is not sufficient to create "reasonable suspicion" to test one or more of the employees of the store, including the claimant.

The unresolved issues as to whether the proper sanitary and privacy protections were followed in the specimen collection process, or whether a proper confirmatory testing process was conducted on the initial sample, remain unresolved, but will not be further addressed given the analysis of the greater issue of the employer's selection process as applied in this case. The employer has not substantially complied with the drug testing regulations. Under the circumstances of this case, while the administrative law judge cannot condone the use of marijuana even off-duty, the employer has not met its burden to show disqualifying work-connected 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 August 3, 2005 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 he is otherwise eligible.

ld/pjs