

**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**

**ROBERT E BEVINS
2741 E GRAND AVE
DES MOINES IA 50317**

**AMERICAN EAGLE AIRLINES INC
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283**

**Appeal Number: 04A-UI-09011-HT
OC: 09/7/03 R: 02
Claimant: Respondent (1-R)**

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:

The employer, American Eagle Airlines, Inc., filed an appeal from a decision dated August 12, 2004, reference 07. The decision allowed benefits to the claimant, Robert Bevins. After due notice was issued a hearing was held by telephone conference call on September 14, 2004. The claimant provided a telephone number of (515) 554-2211. That number was dialed at 9:03 a.m. and the only response was a message machine. A message was left indicating the hearing would proceed without the claimant's participation unless he contacted the Appeals Section at the toll-free number prior to the close of the record. By the time the record was closed at 9:29 a.m. the claimant had not responded to the message and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. The employer participated by General Manager Sue Massey.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: Robert Bevins was employed by American Eagle Airlines, Inc., from April 22 until June 26, 2004. He was a full-time station agent.

On June 21, 2004, the claimant was operating a push back tug, a piece of ground equipment, and damaged the aircraft he was moving. The next day he was suspended and given a post-accident drug test. The sample was collected in the operations area of the employer, in a clean and private restroom, and an employee of EMSI laboratories collected the sample, split it and certified the chain of custody. It was analyzed by EMSI and returned positive for marijuana.

The medical review officer contacted the claimant about the positive results but the employer's witness was not sure whether the claimant gave any information regarding other medications which would give a false positive. He was notified by letter, non-certified, of the test results and the opportunity to have the split sample tested again. The employer was not certain of the time frame he was given to notify American Eagle Airlines, Inc., or whether the cost of the second test was provided.

Mr. Bevins did not request a second test and was discharged on June 26, 2004, by Lead Agent Amy Aguirre.

The telephone number provided by the claimant was answered by a voice mail, which indicated the caller had reached Robert Bevins of Superior Detailing.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes he is not.

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 employer vacillated as to whether the claimant would have been discharged for the damage to the aircraft alone, or whether the positive drug test results played a factor in the decision. The administrative law judge must conclude, because Mr. Bevins was not discharged immediately after the accident but only after the test results were received, that the positive test for marijuana was the determining factor in the decision to discharge.

The record does not establish conclusively that the employer abided by all of the requirements of Iowa Code chapter 730.5 on the drug testing. The claimant was at least not notified of the results by certified letter, which is specifically required by Harrison v. Employment Appeal Board, 659 N.W.2d 583 (Iowa 2003). Without more specific evidence of the drug testing procedures, or an admission by the claimant he had ingested controlled substances, the administrative law judge cannot conclude the employer has met its burden of proof to establish willful and deliberate misconduct on the part of the claimant. Disqualification may not be imposed.

The claimant appears to be self-employed, operating a business named Superior Detailing. The issue of whether he is able and available for work due to being self-employed shall be remanded to the Claims Section for determination.

DECISION:

The representative's decision of August 12, 2004, reference 07, is affirmed. Robert Bevins is qualified for benefits provided he is otherwise eligible.

The issue of whether the claimant is able and available for work due to being self-employed is remanded to the Claims Section for determination.

bgh/pjs