

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

PENNY S CHRYSTAL  
641 - 19<sup>TH</sup> ST APT 2  
DES MOINES IA 50314-1075

PRAIRIE MEADOWS RACETRACK  
& CASINO INC  
PO BOX 1000  
ALTOONA IA 50009-1000

Appeal Number: 06A-UI-03815-JTT  
OC: 03/12/06 R: 02  
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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Prairie Meadows Racetrack & Casino filed a timely appeal from the March 31, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 24, 2006. Claimant Penny Chrystal participated. Brian Coy represented the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Penny Chrystal was employed by Prairie Meadows Racetrack & Casino as a full-time concessionaire from March 10, 2003 until December 28, when Loss and Prevention Manager Jim Allpress suspended her after a drug screen tested positive for methamphetamine. Employee Relations Manager Gina Vitiritto-Robinson subsequently discharged Ms. Chrystal on January 11, 2006. On December 26, Ms. Chrystal suffered injury to her elbow from a collision with a patron and

was referred to the company doctor for evaluation and a post-injury drug test. The doctor's appointment and sample collection took place on December 27, 2005. Neither the employer representative nor Ms. Chrystal knows whether the sample was collected as a split sample. The sample was transported to Express Analytical Laboratory in Marion, Iowa. The employer representative did not know when the sample was received in Marion. A confirmatory test was performed and the results forwarded to the company doctor who was caring for Ms. Chrystal's injured elbow. On January 5, Ms. Chrystal had a return appointment with the company doctor regarding her elbow. At that appointment, the company doctor discussed with Ms. Chrystal the fact that the confirmatory drug test was positive for methamphetamine. The employer representative does not know whether this doctor is designated as the medical review officer for purposes of employee drug testing. The doctor did not discuss with Ms. Chrystal her right to have an independent test of her urine sample. Neither the employer, nor the company doctor notified Ms. Chrystal by certified mail, return receipt requested of the results of the test and the right to obtain a confirmatory test of the secondary sample. While the employer was in the process of discharging Ms. Chrystal based on the failed drug test and violation of the employer's zero-tolerance drug free workplace policy, Ms. Chrystal referenced that she had gone to a party on Christmas Eve and had been "stupid." Ms. Chrystal did not make a specific admission to drug use generally or to methamphetamine use specifically.

#### REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Chrystal was discharged for misconduct in connection with the employment. It does 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 has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

Iowa Code section 730.5 grants a private sector employer the right to conduct drug or alcohol testing under specified circumstances. See Iowa Code section 730.5(8). Employers may conduct drug or alcohol testing in investigating accidents in the workplace in which the accident resulted in an injury to 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 \$1000.00. See Iowa Code section 730.5(8)(f).

Iowa Code section 730.5(7) sets forth the testing protocol to be followed for tests being conducted under authority of the Code Section. One requirement is that the sample be collected as a split sample. See Iowa Code section 730.5(7)(b). Another requirement is that a medical review officer review and interpret any confirmed positive test results prior to the results being reported to the employer. See Iowa Code section 730.5(7)(g). Yet another requirement is that the employer "notify the employee in writing by certified mail, return receipt requested, of the results of the test, the employee's right to request and obtain a confirmatory test of the second sample collected pursuant to paragraph "b" at an approved laboratory of the employee's choice and the fee payable by employee to the employer for reimbursement of expenses concerning the test." See Iowa Code section 730.5(i).

The evidence in the record fails to establish that the employer substantially complied with the requirements set forth in Iowa Code section 730.5. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Chrystal was discharged for no disqualifying reason. Accordingly, Ms. Chrystal is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Chrystal.

DECISION:

The Agency representative's decision dated March 31, 2006, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

jt/kkf