

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KARLA A KESSELING**  
Claimant

**APPEAL NO. 10A-UI-17258-N**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**  
Employer

**OC: 10/10/10**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Claimant filed a timely appeal from a representative's decision dated December 20, 2010, reference 01, which denied unemployment insurance benefits based upon her separation from Wal-Mart Stores, Inc. After due notice, a hearing was held in Council Bluffs, Iowa on March 2, 2011. Ms. Kesselring appeared personally and provided sworn testimony. Appearing and testifying for the employer was Ms. Billie Siddall, Assistant Manager. Employer's Exhibits A through E were received into evidence.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct 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: Karla Kesselring was employed by Wal-Mart Stores, Inc. from August 29, 2000 until September 21, 2010 when she was discharged from employment. Ms. Kesselring worked as a full-time overnight stocker and was paid by the hour. Her immediate supervisor was Ms. Billie Siddall.

Ms. Kesselring was discharged from employment based upon her failure to successfully pass a drug screen that was given on September 4, 2010. On September 4, 2010 while performing her work, Ms. Kesselring was pushed or shoved by another worker causing the claimant to report a work injury. Because the claimant had apparently been injured at work, Ms. Kesselring was sent to a local hospital to be examined. Because there was an injury involved in the incident, Ms. Kesselring was required to undergo drug screening. The employer has a drug testing policy and employees are aware of it. Under the terms of the policy employees are required to undergo drug screening if they are involved in a work injury.

The drug sample was taken at the hospital facility by the Comp Choice Company, a drug testing company retained by Wal-Mart. Ms. Kesselring provided a specimen for testing. The employer is unsure as to whether the sample was split and retained for further testing at a later date.

Prior to test results being provided to the employer, Ms. Kesselring was contacted by a medical review officer and questioned about any medications or other factors that may have skewed the test results.

The positive test results for amphetamines in Ms. Kesselring's system were reported to Wal-Mart Store via e-mail. The claimant's positive test results were communicated to Ms. Kesselring by telephone call.

Because the claimant's positive test results violated the company's written drug testing policy, Ms. Kesselring was discharged from employment.

### **REASONING AND CONCLUSIONS OF LAW:**

The question before the administrative law judge is whether the evidence in the record establishes that Ms. Kesselring was discharged for misconduct in connection with the employment. 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.

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 employer has the burden of proof in this matter. See Iowa Code § 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance 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. of Appeals 1992).

Allegations of misconduct without additional evidence shall not be sufficient to result in disqualification. If the employer does not furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4).

Iowa Code § 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 insurance benefits." Thereafter, in Harrison v. Employment Appeal Board, 659 NW 2d 581 (Iowa 2003), the Iowa Supreme Court held that where 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 employer had reasonable suspicion to require drug testing as Ms. Kesselring had been involved in an injury accident and had reported the injury to the employer. The evidence in the record does not establish that the drug testing complied with Iowa Code § 730.5 accordingly it was not authorized by law and cannot serve as a basis for disqualifying Ms. Kesselring for unemployment insurance benefits. Section 730.5-7-d of the Iowa Code requires that urine samples for testing be split into two components at the time of collection in the presence of the individual from whom the sample was collected and that the second portion of the specimen or sample be of sufficient quantity to permit a second independent confirmatory test of the second sample containing at least 15 ml. The evidence in the record does not establish that the requirement for a split sample took place.

Section 730.5-7-i(1) requires the employer to notify the employee of a confirmed positive test result in writing by certified mail return receipt requested of the results of the test and inform the employee of their right to request and obtain a confirmatory test of the second sample at an approved laboratory of the employee's choice and of the fee payable for the re-testing. The employee must also be informed that they have seven days from the date the employer mailed the test results by certified mail return receipt requested to exercise the employee's right to have the second specimen re-tested by a laboratory chosen by the employee. The evidence in the record establishes that Ms. Kesselring was informed of the positive test only by a telephone call.

Because the employer's drug testing did not comply with Iowa Code § 730.5, the drug test obtained on September 4, 2010 was not authorized by law and cannot serve as a basis for disqualifying Ms. Kesselring from unemployment insurance benefits. Based upon the evidence in the record and the application of the appropriate law, the administrative law judge concludes that Ms. Kesselring was discharged for no disqualifying reason. Accordingly, Ms. Kesselring is eligible for benefits providing that she meets all other eligibility requirements. The employer's account may be charged for benefits paid to Ms. Kesselring.

**DECISION:**

The representative's decision dated December 20, 2010, reference 01, is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, providing that she meets all other eligibility requirements of Iowa law. The employer's account may be charged.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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