

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHEYANNA R ABBEN
Claimant

APPEAL NO. 12A-UI-01213-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KWIK TRIP INC
Employer

**OC: 12/25/11
Claimant: Respondent (1)**

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Kwik Trip, filed an appeal from a decision dated January 27, 2012, reference 01. The decision allowed benefits to the claimant, Cheyanna Abben. After due notice was issued, a hearing was held by telephone conference call on March 2, 2012.

The claimant provided a telephone number to the Appeals Section. That number was dialed at 7:59 a.m. and the only response was a voice mail. A message was left indicating the hearing would proceed without the claimant's participation unless she contacted the Appeals Section prior to the close of the record. By the time the record was closed at 8:18 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 Assistant Store Leader Shane Henninger.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Cheyanna Abben was employed by Kwik Trip from May 8, 2009 until December 20, 2011 as a part-time cashier. During the course of her employment she received a copy of the employer's drug random drug policy.

On December 12, 2011, the claimant was notified by Assistant Store Leader Shane Henninger she had been randomly selected by a third-party administrator to take a random drug test. She gave the sample at Allen Hospital Occupational Health and it was sent to a certified laboratory for testing. A medical review officer from the laboratory contacted her to determine if she was taking any prescription or over the counter medication which might give a false positive and she said no.

The test results were received by the corporate office on December 16, 2011, showing a positive test for marijuana. Mr. Henninger was notified on December 20, 2011, and Ms. Abben was discharged effective immediately. The employer did not send her a certified letter notifying her of her right to have the second part of the original sample tested at a laboratory of her choice.

REASONING AND CONCLUSIONS OF 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 employer did not properly notify the claimant of the test results and her right to have the split sample retested at a laboratory of her choice. This is required by Iowa Code chapter 730.5 the employer must notify the claimant of these rights by certified letter before discharge may occur.

In the present case the employer discharged the claimant immediately upon receiving the test results. The claimant neither admitted nor denied the use of marijuana and the employer has failed to meet its burden of proof to establish misconduct.

DECISION:

The representative's decision of January 27, 2012, reference 01, is affirmed. Cheyanna Abben is qualified for benefits, provided she is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css