

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BRYAN Z PREGON**  
Claimant

**APPEAL NO. 12A-UI-00279-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TENNYSON ENTERPRISES INC**  
Employer

**OC: 12/04/11  
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer filed an appeal from a decision of a representative dated December 30, 2011, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on February 6, 2012. Claimant participated. The employer participated by Allan Thompson, district supervisor, and Clay Harris, general store manager—Fairfield Pizza Hut. The record consists of the testimony of Clay Harris; the testimony of Allan Thompson; the testimony of Bryan Pregon; and Employer's Exhibits 1-6.

**ISSUE:**

Whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a Pizza Hut restaurant located in Fairfield, Iowa. The claimant was hired as a cook on July 8, 2008. He was later promoted to a shift manager position. His last day of work was November 16, 2011. He was terminated on November 19, 2011.

On or about November 12, 2011, another employee named Megan made a written complaint about the claimant to management. She observed the claimant and another employee smoking marijuana. She told management this had been going on for months and that the claimant was usually high. She was tired of working with a manager that was always high. This made her uncomfortable. (Exhibit 1)

Additional investigation was done by the employer and two other employees observed suspicious behavior at work. The employer has a written alcohol and drug policy that prohibits drug use, distribution, possession or impairment. (Exhibit 4) The claimant was aware of this policy. The employer does not have any policy on testing employees and the claimant was not asked to take a drug test.

Allan Thompson, the district representative, made the decision to terminate the claimant. The claimant denied buying or using marijuana at the employer's place of business.

**REASONING AND CONCLUSIONS OF LAW:**

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. The employer has the burden of proof to show misconduct.

The claimant was terminated based on the statements of three employees. These three employees all stated that the claimant engaged in suspicious behavior that indicated the selling

and use of marijuana on the employer's premises during work time. None of these individuals testified live at the hearing. The two management personnel who did testify at the hearing did not have firsthand knowledge. The claimant did testify under oath at the hearing. The evidence, therefore, is testimony on oath from the claimant versus statements from individuals who claim to have seen the prohibited conduct. The employer's evidence, therefore, is hearsay in nature.

Hearsay evidence is permissible in administrative hearings. Although admissible, hearsay evidence is usually not sufficient to sustain the employer's burden of proof in a discharge case when the claimant's testimony contradicts the hearsay testimony.

Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs. Iowa Code Sec. 17A.14(1). Allegations of misconduct 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).

The Iowa Court of Appeals set forth a methodology for making the determination as to whether hearsay rises to the level of substantial evidence. In Schmitz v. Iowa Department of Human Services, 461 N.W.2d 603, 607-608 (Iowa App. 1990), the Court required evaluation of the "quality and quantity of the [hearsay] evidence to see whether it rises to the necessary levels of trustworthiness, credibility and accuracy required by a reasonably prudent person in the conduct of their affairs." To perform this evaluation, the Court developed a five-point test, requiring agencies to employ a "common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better evidence; (4) the need for precision; (5) the administrative policy to be fulfilled." Id. At 608.

In this case, the employer's hearsay evidence is insufficient to sustain the burden of proof. The administrative law judge did not have the opportunity to question the three employees and to weigh the credibility of their testimony against the testimony of the claimant. The employer may have had good business reasons to terminate the claimant but those business reasons are insufficient to disqualify the claimant from receiving unemployment insurance benefits.

The administrative law judge also notes that the employer did not request that the claimant take a drug test. 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. A legal blood test, i.e., a blood test that complies with the provision of Iowa Code § 730.5 can be the basis for disqualification if that test is positive for a banned substance.

**DECISION:**

The decision of the representative dated December 30, 2011, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/pjs