

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 A HENSON  
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LAPORTE CITY IA 50651

FRIENDS OF FAITH RETIREMENT HOMES  
FRIENDSHIP VILLAGE  
600 PARK LN  
WATERLOO IA 50702

Appeal Number: 05A-UI-03522-BT  
OC: 02/27/05 R: 03  
Claimant: Appellant (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, 4<sup>th</sup> 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:

Penny Henson (claimant) appealed an unemployment insurance decision dated March 22, 2005, reference 01, which held that she was not eligible for unemployment insurance benefits because she was discharged from Friendship Village (employer) for work-connected misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 25, 2005. The claimant participated in the hearing. The employer participated through Sharon Holdiman, Director of Nursing, and Velda Phillips, Administrator.

#### FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time licensed practical nurse from January 5, 2004 through January 3, 2005. The employer had a written drug policy and one of the basis for drug testing was reasonable suspicion. The employer had received an anonymous tip that the claimant might be linked to using morphine gel. The claimant was taken to Allen Hospital on December 24, 2004 to be tested for drugs and on the way to the hospital, the claimant told the Administrator that she thought the test would be positive. The employer did not question the claimant further as she felt it was inappropriate. After being tested, the claimant was suspended pending the outcome of the drug test.

The employer was notified on January 3, 2005 that the claimant tested positive for amphetamines and marijuana. A written letter was sent to the claimant on that same day advising her of the outcome, informing her that she was terminated and advising her of her rights to a second confirmatory test. The letter provided details on where the first test was performed, the name of the medical review officer, information on certified laboratories for a subsequent test, information that the claimant would have to pay for a subsequent test and that she had seven days to make the request for a second confirmatory test. The letter was not sent certified but the claimant admitted receiving the letter. The claimant contends she tested positive for marijuana because her boyfriend tampered with her cigarettes so that she would test positive for drugs. She had no explanation for the positive drug test for amphetamines.

#### REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for violating the employer's drug policy after she tested positive for marijuana and amphetamines. Her voluntary admission to the employer on December 24, 2004 that she would probably test positive for drugs was a tacit admission of her drug use. The claimant now offers the explanation that her boyfriend had tampered with her cigarettes by inserting marijuana so that she would fail a drug test. Her explanation lacks credibility. She claims she could not tell the difference between a regular cigarette and a cigarette laced with marijuana. However, there is a distinct difference between the smell of tobacco and the smell of marijuana and it seems highly unlikely that she would not be able to make that distinction if what she claims is true. However, and more importantly, the claimant contends she did not know her boyfriend was doing this but that does not explain how she knew she would test positive for drugs before the test was even taken. She could not offer any explanation as to the positive results for amphetamines. The claimant's violation of a known work rule was a willful and material breach of the duties and obligations to the employer and a substantial disregard of the standards of behavior the employer had the right to expect of the claimant. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

#### DECISION:

The unemployment insurance decision dated March 22, 2005, reference 01, is affirmed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

sdb/sc