

**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**

**JORGE R DUARTE  
610 MCKINLEY AVE  
DES MOINES IA 50315**

**TITAN TIRE CORPORATION  
2345 E MARKET ST  
DES MOINES IA 50317**

**ATTORNEY MARTA DAY  
4044 SE 14<sup>TH</sup>  
DES MOINES IA 50320-1673**

**Appeal Number: 04A-UI-11868-BT  
OC: 10/10/04 R: 02  
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:

Jorge Duarte (claimant) appealed an unemployment insurance decision dated November 2, 2004, reference 01, which held that he was not eligible for unemployment insurance benefits because he was discharged from Titan Tire Corporation (employer) for work-connected misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 29, 2004. The claimant participated in the hearing with Attorney Marta Day. Prior to the start of the hearing, the Administrative Law Judge questioned the claimant as to whether there was a language barrier. The claimant indicated

there was none. The employer participated through Joyce Kain, Human Resources Manager. Employer's Exhibits One through Five were admitted into evidence.

#### 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 tire builder from March 10, 1998 through October 12, 2004. The employer has a written drug policy that informs employees of the drug testing procedures and for which drugs the employer will be testing. The claimant was chosen on a random basis by a third party for a drug test to be performed on October 6, 2004. He was given the opportunity to inform the medical review officer of any drugs he was taking that might have an effect on the outcome of the test. The claimant tested positive for cocaine. He was notified by certified mail, return receipt requested, of the positive result and his right to obtain a confirmatory test of the secondary sample that was taken at the time of the initial test. The claimant did not contact the employer to proceed with a subsequent test of the same sample. He reportedly had a subsequent drug test, which was negative, but it was not taken from the secondary sample and the employer had no information on it. He was discharged for violation of the drug policy and company rule number 27.

#### 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 propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The claimant was discharged for violation of the employer's drug and alcohol policy due to his positive drug test for cocaine. Iowa Code § 730.5 sets forth the rules by which a private company may screen its employees for use of illegal drugs. The employer has a written drug testing policy per Iowa Code § 730.5(9)(b) and tested the claimant on a random basis. The claimant was advised of the drugs to be tested and was given the opportunity to advise the medical review officer of any drugs he was taking that might have affected the outcome. Iowa Code § 730.5(7)(c)(2). The test was performed during the workday at the medical office within the facility and split samples were taken at the time of collection. Iowa Code §§ 730.5(6) and (7)(a-c). A medical review officer reviewed and interpreted the confirmed positive test result and notified the claimant of the positive results before reporting the results to the employer; Iowa Code § 730.5(7)(g). The medical review officer reported that no medications the claimant was taking could have given a positive test result for cocaine. The claimant was notified by regular mail and by certified mail, return receipt requested of the positive result and his right to obtain a confirmatory test of the secondary sample. Iowa Code § 730.5(7)(i)(1) and (2). He was advised if he wanted to proceed to test the secondary sample, he needed to notify the human resources manager by mail. This was not done and the human resources manager was not aware of any additional drug test. Whether or not the claimant had a subsequent drug test is irrelevant as the subsequent test would have had to have been done on the secondary sample taken at the same time as the original test. The employer has met the requirements of Iowa Code § 730.5. 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 November 2, 2004, reference 01, is affirmed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

sdb/tjc