

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

TRAE J NARBONA
Claimant

APPEAL NO. 18A-UI-05810-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

3T SERVICES INC
Employer

OC: 04/29/18
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

3T Services (employer) appealed a representative's May 17, 2018, decision (reference 01) that concluded Trae Narbona (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for June 12, 2018. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer participated by Cindy Zeman, Director of Human Resources. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

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 hired on March 3, 2017, as a full-time welder helper. When the claimant was an employee of Advance Services, he was assigned to work at the employer's location. On January 10, 2017, before he was an employee, he signed for receipt of the employer's handbook. The handbook stated that drugs and alcohol are not to be used on company property and employees should not be under the influence of drugs and alcohol at work. The employer did not have a drug testing policy. The employer issued the claimant some written warnings during his employment.

On April 19, 2018, a field foreman saw the claimant smoking in his car in the parking lot at about 9:30 a.m. The field foreman told the director of human resources that the claimant was smoking marijuana in his car. There were no other employees who witnessed this. The field foreman did not sign a statement about what he saw. At 2:50 p.m. on April 19, 2018, the director of human resources stopped the claimant from working and asked him if he could pass a drug test. The claimant said he could not. He denied smoking marijuana in his car at work. The employer sent the claimant home and did not offer him a ride. At 3:36 p.m. on April 19, 2018, the director of human resources telephoned the claimant and terminated him for using illegal drugs at work. The employer considers it dangerous to use illegal drugs at work.

The claimant filed for unemployment insurance benefits with an effective date of April 29, 2018. The employer participated personally at the fact finding interview on May 15, 2018, by Cindy Zeman.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The claimant was terminated for violating the employer's drug policy. Iowa Code Section 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing. In this case, the employer's drug policy does not contain a testing policy. The first hurdle for the employer is that the claimant did not receive a copy of any policy during his employment period. He did receive one

when he was employed by another company and assigned to work with the employer. Without knowledge of the employer's rules, there can be no showing of intent to break those rules.

Secondly, the employer did not provide a witness at the hearing, or a witness statement, indicating the claimant's behavior on April 19, 2018. If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony but chose not to do so. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct to the director of human resources.

Thirdly, the employer testified that it was concern for safety that led to the claimant's termination. Having said so, the employer did not investigate the allegation until more than five hours had elapsed. It allowed the claimant to work for six hours believing he could not pass a drug screen. The employer testified that it let him drive home under the influence of an unknown substance. There did not appear to be any anxiety on the part of the employer regarding the claimant's medical condition or the possibility of drugs on the employer's property.

An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation. The employer did not provide sufficient evidence of job-related misconduct. It did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's May 17, 2018, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs