

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CORY H STILL
Claimant

APPEAL NO. 17A-UI-04036-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

TEMP ASSOCIATES – BURLINGTON INC
Employer

OC: 11/06/16
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Cory Still (claimant) appealed a representative's March 27, 2017, decision (reference 04) that concluded he was not eligible to receive unemployment insurance benefits due to his separation from work with Temp Associates - Burlington (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for May 5, 2017. The claimant participated personally. The employer participated by Jane Brown, Account Manager, and Susan Watkins, Branch Manager. The employer offered and Exhibit 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 employer is a temporary employment service. The claimant performed services from January 13, 2016, through January 4, 2017. On January 5, 2016, the claimant signed for receipt of the employer's Substance Abuse Policy. The policy allowed pre-employment drug testing for client companies and drug testing for cause but did not list the drugs for which it would be testing. It did not provide an awareness program or rehabilitation services. The policy states, "Violation of Temp Associates policy or refusal to submit to a search or drug screening test will be cause for disciplinary action, including immediate termination of employment."

On January 26, 2017, the claimant was offered a job working at Nestle Purina as a full-time machine operator/packager. As a condition of employment with Nestle Purina, the claimant was to submit to pre-employment testing on January 26, 2017. The employer's branch manager collected the sample and performed the testing in the employer's office. The sample was not given an identification number and the time of testing was not noted. The lot number and expiration date were left blank and a split sample was not collected. The claimant was instructed to sign the form. The branch manager noticed the test came up as non-negative for

THC. She verbally told the claimant the result and that he was terminated. The branch manager did not send the results to a medical review officer or give him a copy of the results.

REASONING AND CONCLUSIONS OF LAW:

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

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.

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 proving disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Iowa Code Section 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing. That policy shall provide uniform requirements for what disciplinary actions the employer will take against an employee upon receipt of a confirmed positive drug test. The employer's substance abuse policy leaves the discipline of the employee to the discretion of the employer. In the claimant's case, he was terminated. The policy implies that other employees could be treated differently. The policy does not meet the requirements of the statute.

Iowa Code Section 730.5(7)(i)(1) mandates that an employer, upon a confirmed positive drug or alcohol test by a medical review officer, notify the employee of the test results by certified mail and the right to obtain a confirmatory test before taking disciplinary action against an employee. A medical review officer did not see the results of the testing. The employer did not notify the claimant of the results by certified mail prior to his termination. If the employer had collected a split sample and if the employer had notified the claimant of the results prior to his termination, he would have had time to consider his options regarding testing of the second sample. The employer denied the claimant of this right under the law. The Iowa Supreme Court has held that an employer may not “benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits.” *Eaton v. Iowa Employment Appeal Board*, 602 N.W.2d at 558.

The employer failed to provide an appropriate drug testing policy, testing procedure, or give the claimant notice of the test results according to the strict and explicit statutory requirements. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative’s March 27, 2017, decision (reference 04) is reversed. 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