

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL NELSON
Claimant

APPEAL NO: 13A-UI-02487-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

TSI ENTERPRISES INC
Employer

OC: 07-01-12
Claimant: Appellant (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the February 22, 2013, reference 02, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on March 28, 2013. The claimant participated in the hearing. Sarah Fiedler, Claims Administrator, participated in the hearing on behalf of the employer. Employer's Exhibits One and Two were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time general laborer for TSI Enterprises from August 22, 2012 to January 30, 2013, assigned to Grain Processing Corporation from August 22, 2012 to January 30, 2013. On January 25, 2013, the claimant took a skid loader from maintenance that had not yet been tagged by maintenance. His foreman instructed him to go over and pick up a skid loader and when the claimant went over to maintenance he saw a skid loader outside with the keys in it which signified to him that it was done because that was the informal policy. Employees did not rely on maintenance tags but rather if the keys are in the equipment they assumed the machine had been repaired. The claimant fueled the skid loader and when he was driving it back to his area it started smoking and then burst into flames. The claimant was able to escape without injury. Because it was an accident resulting in more than \$1,000.00 in damage, the claimant was subject to drug/alcohol testing.

The claimant's supervisor instructed him to complete an incident report and witness statement and sent him back to work before an agent from the employer came to get him to drive him to Trinity Occupational Medicine for a drug screen conducted during work hours. The test was done in a doctor's office and the testing conditions were private and sanitary. The claimant's sample was split at the time of collection, the claimant was given the opportunity to provide any information about anything he might have ingested that could affect the outcome of the test, and was informed of the substances to be tested for. The sample was then sent to a certified lab.

The medical review officer (MRO) notified the claimant January 29, 2013, that he tested positive for marijuana (Employer's Exhibit One). The MRO then informed the employer of the test results on the same date. On January 30, 2013, the employer sent the claimant a certified letter, return receipt requested, notifying him of the test results and his right to obtain a confirmatory test at his own expense and that he had to notify the employer of his intent to seek a confirmatory test within seven days from the date the letter was mailed to the claimant (Employer's Exhibit Two). The employer provides a copy of its written drug policy at orientation and posts copies of the employer's and client's substance abuse policy. The letter informed the claimant his employment was terminated for violating the employer's substance abuse policy. The claimant admitted smoking marijuana on his 50th birthday January 18, 2013, and stated he had not done so for several years prior to that date.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Misconduct must be substantial in order to justify denial of unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of

unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1990).

Iowa Code section 730.5 provides the authority under which a private sector employer doing business in Iowa may conduct drug or alcohol testing of employees. The employer clearly met all requirements of Iowa Code section 730.5 and the claimant admitted using marijuana January 18, 2013. While the circumstances surrounding the accident and the claimant's isolated use of marijuana are unfortunate, he was involved in an accident causing more than \$1,000.00 in damage, which subjected him to drug testing. The employer followed the requirements of Iowa Code section 730.5 before terminating the claimant's employment. Consequently, the employer has met its burden of proving disqualifying job misconduct as that term is defined by Iowa law. Therefore, benefits must be denied.

DECISION:

The February 22, 2013, reference 02, decision is affirmed. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs