

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DENA R TATRO
Claimant

APPEAL NO. 13A-UI-11244-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

EXPRESS SERVICES INC
Employer

OC: 09/08/13
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Express Services (employer) appealed a representative's September 30, 2013, decision (reference 01) that concluded Dena Tatro (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for October 30, 2013. The claimant participated personally. The employer participated by Jody Korleski, Staffing Consultant.

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 agency. The claimant was hired on January 28, 2013, as a full-time general laborer assigned to work at Winnebago Industries. The claimant signed for receipt of the employer's drug testing policy on September 12, 2013. On August 19, 2013, the claimant suffered a head injury at work. She was seen by the employer's physician and, following the employer's drug policy, she submitted to a drug screen. On August 22, 2013, the medical review officer (MRO) telephoned the claimant and told her she tested positive for Benzodiazepines. The MRO told her she had five business days to provide a prescription to the MRO or she would be terminated.

The claimant immediately contacted her psychiatrist whose office was in a town 45 minutes away from the claimant. The psychiatrist wrote a letter stating that the psychiatrist had given the claimant samples of Zoloft that would give a false positive on a drug screen for benzodiazepines. In order for the psychiatrist to send the letter to the MRO, the claimant had to appear in the psychiatrist's office and sign a release. The claimant could not drive because she was restricted from doing so due to her head injury and later she did not have gas money to drive the 90-mile round trip because she had not been working due to the injury. On August 29, 2013, the employer telephoned the claimant and told her she tested positive for a drug, did not provide a prescription to the MRO, and was terminated. The claimant has never received a copy of the results of the drug testing.

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:

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 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(7)(i)(1) mandates that an employer, upon a confirmed positive drug or alcohol test by a certified laboratory, 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. 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 give the claimant notice of the test results according to the strict and explicit statutory requirements and failed to allow her an opportunity for evaluation and treatment. Then the employer required the claimant to perform a task that she could not complete due to her work-related injury, drive a car. Benefits are allowed.

DECISION:

The representative's September 30, 2013, decision (reference 01) is affirmed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/css