IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

COLBY T GIBSON
Claimant

JACOBSON WAREHOUSE CO INC
Employer

APPEAL NO. 08A-UI-02900-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/10/08 R: 03
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Colby Gibson filed a timely appeal from the March 14, 2008, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 8, 2008. Mr. Gibson participated personally and was represented by Attorney Rodney Kleitsch. Don Stevens, General Manager Risk and Human Resources, represented the employer and presented testimony through Chris Gilchrist, Warehouse Office Administrator, and Rob Gehring, Second Shift Supervisor.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Colby Gibson was employed by Jacobson Warehouse Company, Inc., as a full-time warehouse/forklift operator at its Sioux City warehouse from April 9, 2007 until February 1, 2008, when the employer discharged him for alleged refusal to comply with a drug screen. Mr. Gibson was assigned the second shift, 2:30 p.m. to 11:00 p.m. Rob Gehring, Second Shift Supervisor, was Mr. Gibson's immediate supervisor. Don Stevens, General Manager Risk and Human Resources, Chris Gilchrist, Warehouse Office Administrator, and Rob Gehring, Second Shift Supervisor made the decision to discharge Mr. Gibson. Mr. Stevens notified Mr. Gibson of the discharge.

On January 30, 2008, the forklift Mr. Gibson was operating collided with a forklift being operated by a coworker, Kevin Kelly. The collision happened in the vicinity of a blind spot in the employer's warehouse when Mr. Kelly drove his forklift into Mr. Gibson's lane of travel. Neither forklift operator, nor anyone else, was injured. There was no significant damage to either forklift. The employer did not assign a dollar assessment to damage and did enlist anyone else to assess the damage. Neither forklift required repair. After the collision, Mr. Kelly and Mr. Gibson agreed that Mr. Kelly would report the incident to Second Shift Supervisor Rob Gehring. Mr. Kelly reported the incident to Mr. Gehring at approximately 8:30 p.m. Despite the

absence of injury or measurable damage, Mr. Gehring invoked the employer's reasonable suspicion/post-accident drug testing policy and notified Mr. Gibson and Mr. Kelly that each would be required to submit to a drug test. Mr. Gehring's most recent training related to drug testing, or requests for drug tests, occurred at least two years prior the request that Mr. Gibson submit to a test. The accident was the only basis for the request for a drug test. Mr. Gibson had not been engaging in abnormal conduct or erratic behavior. Both employees agreed to submit to a drug test. Mr. Gehring instructed the employees to sign out for the evening and told them they would not be able to work for the rest of the night. Mr. Gehring then went to get his truck so that he could transport the employees to the University of Iowa Hospital & Clinics (UI Healthworks) for collection of urine specimens.

Prior to leaving the facility Mr. Gehring asked each employee if there might be any reason why the employee might not pass the drug test. Mr. Gibson indicated that he had smoked marijuana several weeks earlier and probably would have a positive drug test. Mr. Gehring contacted Chris Gilchrist, Warehouse Office Administrator, who indicated that Mr. Gibson would not need to go for a drug test in light of his admission. Ms. Gilchrist has had no training related to drug testing, or requests for drug tests, for at least two years. Mr. Gehring told Mr. Gibson that he did not need to go provide a drug test and left with Mr. Kelly. Mr. Gehring soon returned to collect Mr. Gibson, because Jason Miller, Warehouse Manager, said Mr. Gibson still needed to submit to the drug test.

Mr. Gehring transported both employees to UI Healthworks, where Mr. Gibson and Mr. Kelly each provided a urine specimen. There is no indication that Mr. Gibson did anything to alter his specimen or substitute another specimen. Mr. Gibson did not see what the collection facility did with the specimen once he provided it to the staff. Mr. Gehring then transported both employees back to the workplace. Mr. Gibson left the workplace at the scheduled end of his shift.

On January 31, a representative of UI Healthworks notified Chris Gilchrist, Warehouse Office Administrator, that UI Healthworks staff had compromised chain of custody with regard to the urine specimens provided by Mr. Gibson and Mr. Kelly and, accordingly, that the specimens were not tested. The employer notified Mr. Gibson that he would have to appear at UI Healthworks and provide a second urine specimen before he would be allowed to return to work. The employer scheduled an appointment for 2:30 p.m. on January 31, 2008. The employer did not compensate Mr. Gibson for the time he spent undergoing the second specimen collection. The employer did not arrange transportation or compensate Mr. Gibson for transportation to UI Healthworks. Mr. Gibson does not have his own transportation and had to make arrangements to have someone else drive him to UI Healthworks. Mr. Gibson appeared at UI Healthworks at the appointed time and provided a second urine specimen for testing. The UI Healthworks staff rejected the specimen because of the temperature of the specimen was "out of tolerance." The UI Healthworks staff instructed Mr. Gibson that he would need to go to the waiting area, drink water, and provide another urine specimen. Mr. Gibson did as instructed and waited 25-30 minutes. At that time, Mr. Gibson's ride said he could no longer wait and had to go to work in Waterloo. Mr. Gibson left with his ride and contacted Ms. Gilchrist to discuss what had happened. Ms. Gilchrist told Mr. Gibson that she would need to call him back.

At approximately 3:30 p.m. on January 31, 2008, Don Stevens, General Manager Risk and Human Resources, and Chris Gilchrist, Warehouse Office Administrator contacted Mr. Gibson via conference call. Mr. Stevens told Mr. Gibson that he would need to appear at UI Healthworks on February 1 and provide another urine specimen. The employer did not offer to provide transportation or compensate Mr. Gibson for his transportation or time. Mr. Gibson

told Mr. Stevens that his transportation options were limited, but that he would work on finding a ride. Mr. Gibson requested a 12:30 p.m. appointment. Mr. Stevens rejected the request and told Mr. Gibson he would have to appear at 10:00 a.m. Mr. Stevens agreed to provide the additional specimen and to appear at 10:00 a.m.

On February 1, Mr. Gibson was unable to arrange transportation for the 10:00 a.m. appointment at UI Healthworks. Mr. Gibson was later able to arrange transportation and arrived at UI Healthworks at 12:30 p.m. The UI Healthworks staff would not collect a urine sample at that time and directed Mr. Gibson to contact Ms. Gilchrist. Mr. Gibson contacted Ms. Gilchrist, who said that she had no information about the incident and would need to speak with her supervisor. Fifteen minutes later, Mr. Gibson received a call from Chad English, Mid-Shift Supervisor. Mr. English told Mr. Gibson that he was discharged from the employment because he had failed to appear at UI Healthworks at 10:00 a.m.

The employer has a written drug testing policy. Mr. Gibson had received a copy of the policy during the course of his employment. The employer did not make a copy of the policy available to the administrative law judge or to claimant's counsel at or before the time of the hearing. Ms. Gilchrist testified about the provisions of the drug testing policy and read some provisions into the record. The reasonable suspicion/post-accident testing provision tracks the language of Iowa Code section 730.5(1)(i). The policy sets forth the controlled substances to be screened as required by Iowa Code section 730.5(7)(c)(2). The policy indicates that the individual to be tested will be given the opportunity to provide relevant information regarding prescription and non-prescription medications that might impact the test, as required by Iowa Code section 730.5(7)(c)(2). The policy indicates an individual who refuses to submit to a drug test will be deemed to have a positive drug test. The policy indicates that an employee who has not requested treatment prior to a positive drug test will be discharged from the employment in the event of a positive drug test. According to Ms. Gilchrist, the policy does not state how the employee is to be notified of a positive test result or state anything about the employee's right to an additional test of the remaining portion of a split specimen.

REASONING AND CONCLUSIONS OF LAW:

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.
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> 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 proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment 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. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

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. In Eaton v Employment Appeal Board, 602 N.W.2d 553 (Iowa 1999), the Supreme Court of Iowa considered the statute and held "that an illegal drug test cannot provide a basis to render an employee ineligible for unemployment compensation benefits." Thereafter, in Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003), the Iowa Supreme Court held that where an employer had not complied with the statutory requirements for the drug test, the test could not serve as a basis for disqualifying a claimant for benefits.

The evidence in the record fails to establish misconduct in connection with the employment that would disqualify Mr. Gibson for unemployment insurance benefits. The weight of the evidence indicates that the employer's request that Mr. Gibson submit to a drug test was not authorized under Iowa Code section 730.5 and, therefore, was an illegal test that cannot be used as the basis of a finding of misconduct that would disqualify Mr. Gibson for unemployment insurance benefits. The evidence indicates that the test request was not based on "injury to a person for which injury, if suffered by an employee, a record or report could be required under chapter 88." See 730.5(1)(i)(5) and 730.5(8)(f). The evidence indicates that neither driver indicated injury, nor did the employer observe any injury, prior to Mr. Gibson being discharged from the employer. The evidence indicates the employer had no reason to believe, prior to the

discharge, that anyone had been injured as a result of the forklift collision. The evidence indicates that the request for the drug test was not based on "damage to property, including to equipment, in an amount reasonably estimated at the time of the accident to exceed one thousand dollars." See Iowa Code section 730.5(1)(i)(5) and 730.5(8)(f). The evidence indicates that the employer had no other basis for a reasonable suspicion drug test. Not only did the employer fail to satisfy the requirements of the statute; the employer also failed to satisfy the requirement of its own reasonable suspicion/post-accident policy. See Iowa Code section 730.5(9) (Drug or alcohol testing or retesting by an employer shall be carried out within the terms of a written policy which has been provided to every employee subject to testing).

The evidence further indicates that employer failed to comply with the requirements of Iowa Code 730.5(6) with regard to scheduling drug tests, providing transportation to and from the specimen collection site, and compensating Mr. Gibson for his time. The test on January 30, complied with these specific requirements because the test occurred during Mr. Gibson's normal work hours, the employer compensated Mr. Gibson for his time, and the employer provided transportation to and from the collection site. The test on January 31, complied with scheduling requirement, but did not comply with the transportation or compensation requirement. The test scheduled for 10:00 a.m. on February 1 complied with none of the requirements.

The evidence further indicates that persons requesting the test, Mr. Gehring and Ms. Gilchrist lacked the training required by Iowa Code section 730.5(8)(h).

The weight of the evidence indicates that there was no refusal on the part of Mr. Gibson to submit to drug testing. The evidence indicates that Mr. Gibson provided a bonafide urine specimen on January 30 and again on January 31. The evidence indicates that Mr. Gibson had good cause for leaving the collection site on January 31, 25-30 minutes after the UI Healthworks staff rejected the specimen he had provided. The evidence indicates that Mr. Gibson appeared at UI Healthworks as soon as he was able to on February 1 for the purpose of providing a third urine specimen.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Gibson was discharged for no disqualifying reason. Accordingly, Mr. Gibson is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Gibson.

DECISION:

The Agency representative's March 14, 2008, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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