

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CRAIG D METZ
Claimant

APPEAL NO. 09A-UI-07644-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

JELD-WEN INC
Employer

**Original Claim: 12/21/08
Claimant: Respondent (2-R)**

Section 96.5-2-a – Misconduct
Section 96.3-7 – Recovery of Overpayment

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated May 11, 2009, reference 05, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 11, 2009. The claimant participated. The employer participated by Jeremy Matney, group manager, and Nicolle Smith, human resources manager. The employer was represented by Amy Pasqualetto, who is affiliated with TALX. The record consists of the testimony of Jeremy Matney, the testimony of Nicolle Smith, the testimony of Craig Metz, and Employer's Exhibits 1 through 12.

ISSUES:

Whether the claimant was discharged for misconduct.

Whether the claimant was overpaid benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer in this case is a window manufacturer. The claimant was initially hired on November 2, 1992, as a production worker. The employer had in place a written substance abuse policy. Since glass and heavy machinery were involved in the manufacturing process, the safety of all employees was very important to the employer.

On February 23, 2005, the claimant tested positive for alcohol following a random screening. The claimant was given the option of enrolling in the Employee Assistance Program (EAP), an offer that the claimant accepted. He participated in the rehabilitation program and returned to work. He was advised that if he ever produced a second positive drug screen result following his completion of the EAP program, he would be terminated. On March 2, 2005, the claimant signed a written acknowledgement concerning his participation in the EAP program and the consequences if he were to produce a second positive drug screen result.

The claimant was tested during a random drug screen on March 31, 2009, and tested positive for marijuana. He admitted he had used marijuana approximately one month prior to the test being done. After his test was positive, the Medical Review Officer(MRO) contacted him to verify the result. He was also given a copy of the test result. He was informed by the MRO that he had the right to request a retest of the split sample at his own expense. He was told that the cost of the test was \$150.00. If the retest was negative, he would be required to undergo an additional drug screen; and if the retest was positive, he would be terminated. If the positive test results stood, he was told he would be terminated for cause.

The claimant did not exercise his rights for a retest and the result stood. He was terminated on April 6, 2009 and was further informed that he would not be considered for rehire by any Jeld-Wen facility for at least six months from April 6, 2009.

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.

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).

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. In Sims v. NCI Holding Corp., 759 N.W. 2d 333, 338 (Iowa 2009), the court held that substantial compliance with the statute was required before a drug test request or drug test may serve as a basis for disqualifying an employee for unemployment insurance benefits.

The evidence in this case established that the employer had a drug testing program that complies with Iowa Code section 730.5. In Harrison, supra, the Iowa Supreme Court stated that the notice requirements of the statute are particularly important, as they serve to protect the employee from adverse employment action based on an erroneous test result. Id. at 586. In this case the claimant admitted that he had used marijuana and he was given all of the information, in writing, that the claimant in Harrison was not.

The employer had an important interest in making certain that the workplace was drug free and that employees did not operate machinery and work with glass while under the influence of any substance set forth in its written policy. The claimant knew the employer had this policy and he had been previously told that if he had a second positive drug screen result, he would be terminated. He admitted to using marijuana, a substance listed on the substance abuse panel. The administrative law judge finds the employer has met the legal requirements set forth in Iowa Code section 730.5 and that work-connected misconduct as defined by the unemployment insurance law has been established. Benefits are denied.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

As the claimant was deemed eligible for unemployment benefits by the representative, the matter is remanded to the claims section for determination of whether there has been an overpayment and, if so, how much.

DECISION:

The decision of the representative dated May 11, 2009, reference 05, is reversed. Unemployment insurance benefits shall be withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The matter is remanded to the claims section for determination of the overpayment issue.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw