

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CHARLES E JENKINS**

Claimant

**APPEAL NO. 09A-UI-05338-VS**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FAMILY DOLLAR SERVICES INC**

Employer

**OC: 03/08/09**

**Claimant: Appellant (1)**

Section 96.5-2-a – Misconduct

**STATEMENT OF THE CASE:**

Claimant filed an appeal from a decision of a representative dated March 30, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on July 20, 2009, in Dubuque, Iowa. Claimant participated. Employer participated by Leah Douglas, human resources manager, and Carol Reimer, registered nurse. The record consists of the testimony of the following individuals: Leah Douglas; Carol Reimer, Stuart Hoffman, M.D., and Charles Jenkins. Employer's Exhibits One through Six were received and made part of the record as well.

**ISSUE:**

Whether the claimant was discharged for misconduct:

**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 claimant was employed as a fork lift driver. He was hired on December 17, 2007. The employer has "Substance Abuse in the Workplace" policy that deals with the use of drugs and alcohol by applicants and employees as it relates to the workplace. As part of that policy, the employer does random drug screening. The claimant was made aware of that policy during his orientation.

The claimant had a random drug screening done on March 3, 2009. A urine specimen was collected on that date and sent to a laboratory for testing. The laboratory did an initial test that was positive for marijuana. A second test was done using gas chromatography/mass spectrometry that confirmed the presence of marijuana. The medical review officer, Stuart Hoffman, M.D. then attempted to contact the claimant concerning the positive test. The claimant was telephoned at 1:32 p.m. on March 6, 2009, and there was a hang up. A second call was made at 2:38 p.m. There was no answer and a message was left. At 2:39 p.m. Family Dollar was asked to have the claimant call. The claimant did not call. A two-day hold was placed on the report to the employer in order to give the claimant an opportunity to call. The

claimant still did not call. The report was then given to the employer on March 10, 2009 at 10:00 p.m.

On March 13, 2009, the claimant was notified by certified mail about the confirmed positive test and the right to obtain record relating to the test and to have a confirmatory retest of the split sample. The cost was given at \$150.00. The claimant was given a form on which to request a retest. The claimant did not request a retest and was terminated by the employer.

## **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 complied with the provisions of Iowa Code section 730.5. Although the claimant denied having used marijuana "at that time", the test was positive. The Medical Review Officer (MRO), Dr. Hoffman, testified at the hearing. The claimant himself asked Dr. Hoffman if the test could be positive if the claimant was exposed to other individuals who were using marijuana in the same room. Dr. Hoffman persuasively explained that the test would not be positive in those circumstances. The only credible conclusion given the evidence is that the test was positive for the claimant having used marijuana.

The employer has an interest in maintaining a drug free workplace for the safety of all of its employees. The claimant operated a fork lift and the employer could reasonably expect that an individual operating this piece of equipment would not be under the influence of drugs or alcohol. The claimant's positive drug test represented a deliberate act that constituted a material breach of his duty to the employer. Benefits are denied.

**DECISION:**

The decision of the representative dated March 30, 2009, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/pjs