

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHELLE D TOWNS
Claimant

APPEAL NO. 13A-UI-12673-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DES MOINES EAS GROUP LLC
Employer

OC: 10/13/13
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Michelle Towns filed a timely appeal from the November 6, 2013, reference 03, decision that denied benefits. After due notice was issued, a hearing was held on December 4, 2013. Ms. Towns participated. Jennifer Schubert represented the employer.

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: Michelle Towns was employed by Des Moines EAS Group, L.L.C., doing business as Extenda Stay Hotels, as a part-time front desk clerk from July 3, 2013 until September 5, 2013, when the employer discharged Ms. Towns in connection with a positive drug test. On September 3, 2013, an employee alleged to the employer that Ms. Towns and another employee had been smoking methamphetamine in the manager's office. The employer declines to identify the employee who made the allegation. The employer made no investigation to determine whether the allegation was credible before the employer had Ms. Towns submit to drug testing on September 5, 2013. The employer had all staff drug tested at that time. The employer's drug testing policy was limited to a document that required employees to submit to drug testing at the request of the employer's insurance carrier. The employer representatives who requested that Ms. Towns submit to drug testing had no training in drug testing or discerning whether a person was under the influence of drugs or alcohol. Ms. Towns provided a urine specimen at a collection site. The specimen was collected as a single specimen. The collection site did a preliminary test of the specimen and the specimen tested positive for methamphetamine. The employer discharged Ms. Towns from the employment that same day. The employer later received a formal report of drug test result that was positive for methamphetamine. No medical review officer interviewed Ms. Towns about the result. The employer did not mail notice to Ms. Towns of her right to have a portion of the specimen tested as a facility of her choosing.

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) alone. 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 employer's drug testing policy and procedures did not even begin to comply with the most basic requirements of Iowa Code section 730.5. The allegation the employer received was insufficient to establish reasonable suspicion to have Ms. Towns drug tested. The employer lacked the training the statute requires before an employer can engage in drug testing. The employer's policy does not comply with the requirements of the statute. The specimen collection failed to comply with the requirements of the statute. No medical review officer spoke with Ms. Towns about the test result. The employer failed to provide formal notice of result, or of the right to additional testing of specimen, to Ms. Towns by certified mail return receipt requested. The drug testing was illegal under Iowa Code section 730.5 and cannot serve as the basis for a finding of misconduct or disqualification for benefits.

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

DECISION:

The Agency representative's November 6, 2013, reference 03, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css