IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

SHAUN K SCHULER
Claimant

MENARD INC
Employer

APPEAL NO. 18A-UI-12395-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/02/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Shaun Schuler filed a timely appeal from the December 19, 2018, reference 01, decision that held he was disqualified for benefits and the employer's account would not be charged for benefits, based on the deputy's conclusion that Mr. Schuler was discharged on December 5, 2018 for violation of a known company rule. After due notice was issued, a hearing was held on January 14, 2019. Mr. Schuler participated. Paul Hammell represented the employer and presented testimony through John Ryan. Exhibits 1 through 7 and A were received into evidence.

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: Shaun Schuler was employed by Menard, Inc. as a full-time Outside Yard Team Member from February 2017 until December 5, 2018, when John Ryan, Store Manager, discharged him from the employment based on a positive drug test. Mr. Schuler's job duties involved handling boards, operating a forklift and otherwise assisting customers in the yard area of the Marion, Iowa store. Mr. Schuler's scheduled work days varied from week to week. Mr. Schuler's shift started at 5:00 a.m. and ended at 2:00 p.m. Matt Ross, Outside Yard Manager, was Mr. Schuler immediate supervisor.

On November 27, 2018, Mr. Schuler left work early to seek medical evaluation for a shoulder injury. Mr. Schuler had injured his shoulder a year earlier in a non-work related fall. On or about November 14, 2018, Mr. Schuler experienced pain in the same shoulder while handling Christmas trees at work. Mr. Schuler continued to experience pain in his shoulder while at work and this pain prompted him to leave work early on November 27, 2018. At 8:30 a.m. on November 27, Mr. Schuler called the Marion Menards store and spoke with Store Manager John Ryan. Mr. Schuler told Mr. Ryan that he had left work early to have his shoulder checked out, that he had sprained his shoulder, that he might need surgery, and that his doctor had taken

him off work for couple days. Mr. Ryan told Mr. Schuler that he needed to come to the store and complete a worker's compensation injury report. At 9:30 a.m., Mr. Schuler went to the store. Mr. Ryan directed Mr. Schuler to meet with Chris Ruff, Front End Manager, to complete the worker's compensation injury report. Mr. Ruff drafted the report. Mr. Schuler and Mr. Ruff contributed details to the report. After the injury report was complete, Mr. Ryan or Mr. Ruff told Mr. Schuler that he needed to submit to drug testing in connection with the injury report. The request was made at a time when Mr. Schuler was scheduled to be at work. Mr. Schuler had not clocked in when he reported to the store to complete the injury report and the employer had not instructed him to clock in. Mr. Ryan participates in annual 30 to 45-minute training regarding reasonable suspicion drug testing. Mr. Duff may or may not participate in similar training. Neither has participated in an initial two-hour training and an annual one-hour training on drug testing and discerning whether an employee is under the influence of alcohol or drugs.

After the employer told Mr. Schuler he needed to submit to drug testing, Mr. Ruff transported Mr. Schuler to a specimen collection clinic where Mr. Schuler provided a breath specimen for alcohol testing and a urine specimen for drug testing. The alcohol test yielded a negative result. The urine specimen was divided into a split specimen and forwarded to a drug testing laboratory. After the drug test, Mr. Ruff transported Mr. Schuler back to the Marion Menards store and Mr. Schuler drove himself home. The employer did not provide Mr. Schuler with any medical evaluation or treatment. The employer is unaware whether the worker's compensation injury report was forwarded to a worker's compensation insurance carrier for evaluation and response.

After the time off specified by Mr. Schuler's medical provider, Mr. Schuler returned to his regular work duties on December 3, 2018. On that day, a certified medical review officer from First Advantage Corporation transmitted a Controlled Substance Test Report to the employer that indicated the specimen provided by Mr. Schuler had tested positive for marijuana metabolites. The medical review officer had not spoken with Mr. Schuler prior to reporting the positive test result to the employer. On December 5, 2018, Mr. Ryan notified Mr. Schuler that he was discharged based on the positive test result.

On December 12, 2018, Mr. Schuler received a certified letter from the employer. The letter was dated December 5, 2018. The letter stated that Mr. Schuler had tested positive for drugs and/or alcohol. The employer did not provide Mr. Schuler with a copy of the actual drug test report. The employer's letter notified Mr. Schuler of his right to have the second portion of the split-specimen urine sample tested at a lab or his choice and at a cost of $150.00. The letter did not state whether the $150.00 charge was comparable to the employer's cost in connection with testing the other portion of the split-specimen urine sample. The letter provided Mr. Schuler with a seven-day deadline, measured from the December 5, 2018 post-mark date, to request the additional test. Mr. Schuler did not take action to request additional testing of the urine specimen.

The employer has a written drug testing policy that the employer provided to Mr. Schuler at the start of his employment. The policy provided for Reasonable Cause drug testing and for Post-Accident drug testing: The Reasonable Cause provision states as follows:

> Team Members will be asked to submit to a drug and/or alcohol test if reasonable cause exists indicating that the Team Member is under the influence of illegal drugs or alcohol. Reasonable Cause means a basis for forming a belief based on specific facts and rational inferences drawn from those facts.

The Post-Accident drug testing provision states as follows:

> A drug and/or alcohol test will be conducted on all Team Members involved in accidents occurring in the workplace in which the accident either results in an injury to a person for which injury, if suffered by a Team Member, a record or report could be required under the Iowa Occupational Safety and Health Act, Iowa Code Chapter 88, or results in damage to property, including to equipment, in an amount reasonably estimated at the time of the accident to exceed One Thousand Dollars ($1,000). Team Members are expected to make themselves available for post-accident testing. If circumstances require a Team Member to leave the scene of an accident, the Team Member must make a good faith attempt to be tested and to notify Menards of his or her location. Any Team Member who fails to report any work-related accident is in violation of this Policy and is subject to disciplinary action, up to and including termination. Under certain state laws, Team Members testing positive may be ineligible for worker's compensation benefits.

The drug testing policy listed the substances to be screened and that list included marijuana.

The drug testing policy left to the employer discretion to decide the consequence associated with a positive drug test, as follows:

> CONSEQUENCES FOR POLICY VIOLATIONS
> Team Members who engage in any of the prohibited legal conduct listed above are in violation of this Policy and are subject to discipline, up to and including termination and at Menards' sole discretion. While the discipline imposed will depend on the circumstances, and Menards reserves the right to determine in its discretion, discipline imposed, ordinarily certain offenses will result in immediate termination (e.g. possession, sale or use of illegal drugs on Menards' premises or during working time).

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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).

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 notice requirement set forth in the statute, the test could not serve as a basis for disqualifying a claimant for unemployment insurance benefits.

The weight of the evidence in the record establishes a discharge for no disqualifying reason. Neither Mr. Ryan nor Mr. Ruff had the initial two-hour training nor the one-hour subsequent annual training the statute requires before a private sector employer conducting business in Iowa is authorized to drug-test employees. See Iowa Code section 750.5(9)(h). The employer's drug testing policy does not provide for uniform enforcement. Instead the policy reserves to the employer discretion to determine the consequences associated with a positive drug test. See Iowa Code section 750.5(9)(b). The drug test request was not based on workplace accident or reasonable suspicion. The weight of the evidence fails to establish that a record or report could be required under the Iowa Occupational Safety and Health Act, Iowa Code Chapter 88. The report the employer created appears to have been created only as a pretest to drug test

Mr. Schuler and not used for any other purpose. See Iowa Code section 750.5(1)(i). The drug test collection occurred during Mr. Schuler's usual work hours, but the employer failed to compensate Mr. Schuler for the time involved in the drug test. See Iowa Code section 750.5(6). The medical review officer did not speak with Mr. Schuler prior to reporting a positive test to the employer. See Iowa Code section 730.5(7)(c)(2). The evidence fails to establish that the $150.00 fee the employer reported to Mr. Schuler as the cost of additional testing of the split-specimen was comparable to the fee the employer paid for the initial testing. See Iowa Code section 730.5(7)(i). For all these reasons, the positive drug test was not authorized under Iowa Code section 730.5 and cannot serve as the basis for a finding of misconduct in connection with the employment or for disqualification for unemployment insurance benefits. Mr. Schuler was discharged for no disqualifying reason. Accordingly, Mr. Schuler is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The December 19, 2018, reference 01, decision is reversed. The claimant was discharged on December 5, 2018 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

jet/rvs