IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ROWDY L TWOGOOD
Claimant

JELD-WEN INC
Employer

APPEAL NO. 09A-UI-04778-JTT

ADMINISTRATIVE LAW JUDGE DECISION

Original Claim: 02/22/09
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 17, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 14, 2009. Claimant Rowdy Twogood participated. Malia Maples of TALX UC eXpress represented the employer and presented testimony through Chris Juni, Safety and Human Resources Manager, and Dr. Seth Portnoy, D.O. Exhibits One through Eight 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: Rowdy Twogood was employed by Jeld-Wen, Inc., as a full-time machine operator from March 5, 2003 until February 14, 2009, when Chris Juni, Safety and Human Resources Manager, discharged him in response to a failed drug test.

On February 10, 2008, the employer requested that Mr. Twogood submit to a "random" drug screen, pursuant to the employer's substance abuse policy. Each month, the employer's corporate office selects 10 percent of the employees for "random" drug screens. Chris Juni, Safety and Human Resources Manager, does not know exactly how the employer's corporate office selects the 10 percent to be subjected to a drug test or whether the employer utilizes an outside entity to make the section. On February 10, Mr. Twogood provided a urine sample that tested positive for marijuana and one other substance. Mr. Twogood had provided another sample in 2005 that had tested positive for marijuana. That sample had been obtained through the same "random" drug testing process.

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).

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 indicates that both "random" drug tests that factored into the discharge were not authorized by Iowa Code section 730.5 and cannot be used as a basis for a finding of misconduct that would disqualify Mr. Twogood for unemployment insurance purposes.

Iowa Code section 730.5(1)(l) provides the procedure by which employees are to be selected for random drug testing under the statute:

> l. "Unannounced drug or alcohol testing" means testing for the purposes of detecting drugs or alcohol which is conducted on a periodic basis, without advance notice of the test to employees, other than employees whose duties include responsibility for administration of the employer's drug or alcohol testing program, subject to testing prior to the day of testing, and without individualized suspicion. The selection of employees to be tested from the pool of employees subject to testing shall be done based on a neutral and objective selection process by an entity independent from the employer and shall be made by a computer-based random number generator that is matched with employees' social security numbers, payroll identification numbers, or other comparable identifying numbers in which each member of the employee population subject to testing has an equal chance of selection for initial testing, regardless of whether the employee has been selected or tested previously. The random selection process shall be conducted through a computer program that records each selection attempt by date, time, and employee number.

The weight of the evidence indicates that the selection process Jeld-Wen used to select Mr. Twogood for "random" drug testing on both occasions failed to comply with the clear requirements of the statute. Accordingly, neither test was authorized by law. Neither test may serve as the basis for a finding of misconduct or a disqualification for unemployment insurance benefits. Because the very selection process was fundamentally flawed, the administrative judge need not further evaluate the employer's policy or testing procedure for conformity with the statute.

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

DECISION:

The Agency representative's March 17, 2009, reference 01, decision is affirmed. 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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