

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRIAN A NIEDERT
Claimant

APPEAL NO. 14A-UI-13134-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 11/23/14
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 9, 2014, reference 01, decision that allowed benefits to the claimant and that held the employer's account could be charged for benefits, based on an agency conclusion that the claimant had been discharged for no disqualifying reason. After due notice was issued, a hearing was held on January 20, 2015. Claimant participated. Kristi Fox represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or dishonesty in connection with the fact-finding interview.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant was overpaid benefits.

Whether the claimant must repay benefits.

Whether the employer's account may be charged for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Brian Niedert was employed by Tyson Fresh Meats, Inc., as a full-time production worker from 2012 until November 22, 2014, when the employer discharged him from the employment. The discharge was based on Mr. Niedert possessing and smoking marijuana on the employer's premises on October 20, 2014 and on an October 21, 2014 drug test. The conduct was recorded on surveillance. The employer has a written policy that prohibits possession of illegal controlled substances on the employer's premises. The employer questioned Mr. Niedert on October 21, 2014 and Mr. Niedert admitting to possessing and smoking marijuana on the

employer's premises. Based on the surveillance record and Mr. Niedert's admission, the employer requested that Mr. Niedert submit to drug testing and Mr. Niedert acquiesced. Mr. Niedert provided a urine specimen at the nurse's office. The specimen was collected as a split specimen. The employer then provided Mr. Niedert with three options. The first option was to immediately separate from the employment. The second option was to seek professional treatment. The third option was to take a one-month leave of absence, return for drug testing at the of the end of the leave period, return to work if the test was negative, and be subject to additional testing for the subsequent three to six months. Mr. Niedert selected the third option and immediately commenced a leave of absence.

After Mr. Niedert commenced his leave of absence on October 21, 2014, the employer decided that it should not have offered Mr. Niedert the three options and that Mr. Niedert should have been immediately discharged from the employment. The employer attempted to contact Mr. Niedert on October 30 and November 3. Mr. Niedert had ceased using the number the employer was using in its attempts to reach him and Mr. Niedert had not provided the employer with his updated telephone number. On November 22, 2014, Mr. Niedert contacted the employer to report that had taken an over-the-counter drug test that provided a negative result and was ready for the employer to drug test him. The employer directed Mr. Niedert to appear for a meeting that day. At the meeting, the employer discharged Mr. Niedert from the employment.

The employer participated in the fact-finding interview through providing an oral statement and through documentation that detailed the basis for the discharge.

The claimant established a claim for benefits that was effective November 23, 2014 and received \$3,240.00 in benefits for the nine-week period of November 23, 2014 through January 24, 2015.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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). 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 has presented insufficient evidence to establish misconduct in connection with the employment based on the drug test. The evidence indicates there was reasonable suspicion to believe Mr. Niedert had possessed and smoked marijuana on the employer's property on October 20, 2014. However, the employer has presented insufficient evidence to establish that its drug testing policy or procedure complied with the any of the several requirements of Iowa Code section 730.5.

The employer has presented sufficient evidence to establish that Mr. Niedert possessed marijuana on the employer's premises on October 20, 2014. Mr. Niedert admitted to the same on October 21, 2014. The employer notified Mr. Niedert at that time that one of the available options was ending Mr. Niedert's employment there and then. The employer realized its policy error shortly thereafter and commenced trying to reach Mr. Niedert on October 30, 2014 for the purpose of discharging him from the employment. All of the day from October 30, 2014 to November 22, 2014 was attributable to Mr. Niedert not providing the employer with an updated phone number. The evidence establishes a current act of misconduct in connection with the employment based on Mr. Niedert's illegal act of possessing marijuana on the employer's premises. That illegal possession was also a violation of the employer's policy prohibiting possession. Based on the possession of marijuana, Mr. Niedert is disqualified for unemployment insurance benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid \$3,240.00 in benefits for the nine-week period of November 23, 2014 through January 24, 2015. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

DECISION:

The December 9, 2014, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The claimant was overpaid \$3,240.00 in benefits for the nine-week period of November 23, 2014 through January 24, 2015. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid for future benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs