

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ERIN N TULLIS

Claimant

APPEAL NO. 16A-UI-12889-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FERRARA CANDY COMPANY

Employer

OC: 11/06/16

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Erin Tullis filed a timely appeal from the November 29, 2016, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on an agency conclusion that Ms. Tullis was discharged on November 9, 2016 for misconduct in connection with the employment. After due notice was issued, a hearing was held on December 20, 2016. Ms. Tullis participated. Tyler Walker represented the employer. The hearing in this matter was consolidated with the appeal hearing in Appeal Number 16A-UI-12871-JTT. Exhibits A through F were received into evidence. The administrative law judge took official notice of the agency's administrative record of Ms. Tullis' weekly claims (KCCO).

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: Erin Tullis was employed by Ferrara Candy Company as full-time palletizer from 2014 until September 9, 2016, when Tyler Walker, Human Resources Manager, discharged for refusing to submit to purported post-accident drug testing. Ms. Tullis' usual work hours were 7:00 a.m. to 3:30 p.m., Monday through Friday. The employment also involved overtime shifts on Saturdays and/or Sundays as needed. Ms. Tullis' work duties involved operating a fork lift and robotic device to stack boxes on pallets. Ms. Tullis' immediate supervisors were Production Supervisors Dave Hollinger and Russ Hughes.

On the morning of Saturday, November 5, 2016, Ms. Tullis passed out at work. Ms. Tullis had been experiencing severe stomach cramps for a couple days and this contributed to her passing out at work. At the time of the incident, Ms. Tullis was in the employee locker room on a scheduled break. Ms. Tullis hit her head when she passed out. Crew Leader Jessica Steffen was in the locker room at the time Ms. Tullis passed out and reported the matter to Human Resources Assistant Deanne Boles. When Ms. Tullis regained consciousness, Mr. Hughes and

Ms. Boles were standing over her. The pair escorted Ms. Tullis to the onsite first aid room. At that point, Mr. Hughes left Ms. Tullis in the care of Ms. Boles. Mr. Hughes asked Ms. Boles to let him know what time Ms. Tullis clocked out. In other words, Mr. Hughes had decided to send Ms. Tullis home for the day. Ms. Boles asked Ms. Tullis whether she had someone who could collect her from the workplace. Ms. Tullis' boyfriend was available to collect Ms. Tullis from the workplace. Before Ms. Tullis left the workplace, Ms. Boles recommended that Ms. Tullis go the urgent care facility the employer utilizes for work related injuries. Ms. Boles did not direct Ms. Tullis to go to urgent care. Ms. Tullis told Ms. Boles that she intended to go home and deal there with her stomach cramps.

At 8:50 a.m., Ms. Tullis' boyfriend picked Ms. Tullis up at the workplace and transported her home. When Ms. Tullis went home, she took medication that she asserts was ibuprofen and laid down with a heating pad. At some point, Ms. Tullis telephoned the urgent care facility. The urgent care staff told Ms. Tullis that the urgent care facility would not be the appropriate place for her to be evaluated and that she should instead seek evaluation at an emergency room. At 11:00 a.m., Ms. Boles called Ms. Tullis to check on her. At that time, Ms. Tullis told Ms. Boles about her contact with the urgent care facility. Ms. Boles directed Ms. Tullis to go to the emergency room. Ms. Tullis told Ms. Boles that she would go to the emergency room if she did not begin to feel better.

Sometime between noon and 1:00 p.m., Ms. Tullis' boyfriend transported Ms. Tullis to the emergency room. Ms. Boles was waiting in the parking lot and entered the facility with Ms. Tullis. As they were walking in, Ms. Boles told Ms. Tullis that the workplace incident was a worker's compensation matter, that Ms. Boles would be directing Ms. Tullis' care, and that Ms. Tullis would have to submit to drug testing. Ms. Tullis was suspicious of Ms. Boles' motive and requested the assistance of a union representative. Ms. Boles told Ms. Tullis that there was no need for a union representative at that point.

The employer has a written drug testing policy. A summary of the policy appears in the employee handbook that had been provided to Ms. Tullis. The full statement of the drug and alcohol testing policy was incorporated into the collective bargaining agreement that governed Ms. Tullis' employment. Ms. Tullis had received a copy of the collective bargaining agreement. The policy called for reasonable suspicion drug testing and for post-accident drug testing. The policy set forth the substances that would be screened. The policy set forth the steps to be followed to collect and process a urine specimen for drug testing. The policy called for notice to be provided to the employee regarding a positive drug test along with notice of the right to have the second portion of the split specimen tested. The policy indicated that an employee who was not eligible for rehabilitation under the parameters of the policy, would be discharged in connection with a positive drug test. The policy indicated that refusal to submit to drug testing would result in immediate discharge.

After Ms. Tullis arrived at the emergency room, she had to wait a couple hours to be seen by a physician. In the meantime, Ms. Boles made contact with the emergency room staff and asserted that the matter was covered by worker's compensation and that the employer was directing Ms. Tullis' care. Ms. Tullis asserted that the matter was a personal health concern involving her stomach cramps and, was not a worker's compensation matter, and that her care would be paid for through her personal health insurance. At the time the emergency room physician examined Ms. Tullis, the physician determined that Ms. Tullis did not require any additional care and sent her home to rest and recover from her stomach cramps with a note that excused her from work until Monday, November 7. Before Ms. Tullis left the emergency room facility, Ms. Boles told her that she needed to accompany Ms. Tullis to the emergency room lab

to provide a specimen for drug testing. Ms. Tullis refused to comply with the directive and went home instead.

Shortly after Ms. Tullis had passed out on November 5, Ms. Boles had made contact with Tyler Walker, Human Resources Manager and Mr. Walker had instructed Ms. Boles on how to proceed in the matter. Mr. Walker had joined Ferrara Candy Company in August 2016. Prior to joining the employer, Mr. Walker had participated in substance abuse training through a prior employment. That training took place in June or July of 2016. The training was Internet-based and addressed discerning reasonable suspicion to engage in drug testing. The training did not address drug testing procedure. The training lasted one to 1.5 hours. It is unclear whether Ms. Boles has undergone any training in discerning whether an employee is under the influence of alcohol and/or drugs or training in drug testing practices and procedures.

On November 7, Ms. Tullis contacted the workplace and spoke with Mr. Walker regarding her return to work. At that time, Mr. Walker notified Ms. Tullis that he was going to keep her off work while he considered the refusal to submit to drug testing. On November 9, Mr. Walker notified Ms. Tullis that she was being discharged for refusal to submit to post-accident drug testing.

Though Ms. Boles had completed a first report of injury and the employer had referred the matter to the employer's worker's compensation insurance carrier, the carrier declined the claim and did not pay for Ms. Tullis' emergency room care. The employer did not deem the workplace incident to be OSHA reportable and did not report the incident to OSHA.

On November 14, 2016, Ms. Tullis received additional medical evaluation for her stomach cramp issue and was diagnosed with ovarian cysts and ectopic pregnancy. At that time, Ms. Tullis' physician restricted Ms. Tullis to lifting no more than 10 pounds and to not using stairs. On November 21, Ms. Tullis underwent surgery. Ms. Tullis' doctor took her off work until a follow-up appointment on November 28, 2016. In the note the physician provided to Ms. Tullis on November 21, 2016, the physician specifically indicated that Ms. Tullis' health condition was not a work related injury. On November 28, 2016, Ms. Tullis returned for a follow up medical appointment and was at that time released to return to work without restrictions.

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 weight of the evidence establishes that the employer's November 5, 2016 request that Ms. Tullis submit to drug testing was not authorized by Iowa Code section 730.5. Accordingly, Ms. Tullis' refusal to submit to the drug testing cannot serve as a basis for disqualifying her for unemployment insurance benefits. The weight of the evidence indicates that the workplace

incident did not involve an OSHA reportable incident, as required by the statute before post-accident testing would be authorized. See Iowa Code Section 750.5(1)(i). The employer recognized that the matter was not OSHA reportable and did not report the matter to OSHA. The evidence failed to establish any basis for the drug test request other than Ms. Tullis passing out in the locker room while on break. To suggest that such an incident subjected Ms. Tullis to post-accident drug testing would be to suggest that any time an employee fell ill while at work, such illness would subject an employee to drug testing. The statute specifically precludes such broad interpretation of the post-accident drug testing authority by requiring an OSHA-reportable injury or property damage exceeding \$1,000.00. The weight of the evidence establishes that Mr. Walker lacked the training the statute requires of supervisory personnel before drug testing is authorized under the statute. Mr. Walker's one to 1.5 hours of Internet-based training in discerning reasonable suspicion did not satisfy the requirement set forth at 730.5(9)(h). The evidence also fails to establish that Ms. Boles possessed the requisite training. There were additional problems with the testing procedure, but those referenced above were sufficient to render the drug test request illegal under statute.

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

DECISION:

The November 29, 2016, reference 01, decision is reversed. The claimant was discharged on November 9, 2016 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/rvs