

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES D JENNINGS

Claimant

APPEAL NO. 08O-UI-01240-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MEINTS CONSTRUCTION INC

Employer

**OC: 11/18/07 R: 02
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

James D. Jennings filed a timely appeal from the December 12, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was commenced on February 19, 2008 and concluded on February 21, 2008. Mr. Jennings participated and was represented by Attorney Kathryn Evans of Iowa Legal Aid. Patricia Meints, co-owner and Office Manager, represented the employer. Exhibits Two and Three 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: James D. Jennings was employed by Meints Construction, Inc., as a full-time painter from April 26, 2004 until November 15, 2007, when owner Marlin Meints discharged him based on a positive drug screen. On Wednesday, November 7, 2007, Mr. Jennings was working at a jobsite when he suffered a serious dog bite to his hand that required medical attention. The employer did not file a first report of injury. The employer notified its workers' compensation insurance carrier, which advised the employer not to treat the incident as a workers' compensation claim. Instead, the insurance carrier advised the employer that the carrier would address the matter with the owner of the property where Mr. Jennings was bitten. The employer directed Mr. Jennings to go to Healthworks in Mason City, where Mr. Jennings received treatment for his hand. When the physician had concluded treating Mr. Jennings' injury the physician reminded Mr. Jennings that Meints Construction had a post-accident alcohol and drug testing policy and sent Mr. Jennings to a nurse at Healthworks so that he could provide a urine specimen for testing. Mr. Jennings complied and provided a urine specimen. Neither Mr. Jennings nor the employer knows whether the specimen was collected as a split sample. After Mr. Jennings was finished at Healthworks, he returned to his duties. Mr. Jennings provided the nurse with a list of the medications that had been prescribed to him.

On Friday, November 9, the Healthworks physician who had treated Mr. Jennings called Mr. Jennings to advise that the urine specimen had tested positive for two substances. One was a medication that had been prescribed to Mr. Jennings. The other substance was marijuana. The physician told Mr. Jennings that he would be reporting the result to the employer. The physician did not discuss with Mr. Jennings his right to have a second test or anything related to possible further testing. It is unclear whether the physician that treated Mr. Jennings was a medical review officer as defined by Iowa Code section 730.5(1)(f) or whether the physician had reviewed the testing procedure to ensure an accurate test result.

On Monday morning, November 12, Mr. Jennings notified Project Manager Ron Loudenberg of the positive test result. Mr. Jennings admitted to Mr. Loudenberg that he had smoked marijuana several days prior to the drug screen at a time when he was off-duty. Mr. Jennings asked whether he would be discharged from the employment. Mr. Loudenberg indicated he did not know. When owner Marlin Meints arrived, Mr. Jennings notified Mr. Meints of the positive test result. Mr. Jennings admitted to Mr. Meints that he had smoked marijuana several days prior to the drug screen at a time when he was off-duty. Mr. Jennings asked whether he would be discharged. Mr. Meints indicated that he would need to review the policy and get back to Mr. Jennings.

On November 14, the employer received a drug test report from Healthworks. The report indicated a positive result. The employer subsequently received an amended report that deleted the prescription medication and indicated a positive result for marijuana.

The employer did not provide Mr. Jennings with a copy of either test result, by certified mail or any other means.

The employer has a written drug testing policy. Mr. Jennings received a copy of the policy on August 9, 2005. The employer's drug testing policy deviates substantially from the requirements set forth in Iowa Code section 730.5. The deficiencies of the policy are too numerous to list. The policy says nothing about providing written notice of the test result to the employee by certified mail or any other means. The policy says nothing about an employee's right to a second test. The policy says nothing about collecting urine specimens as split samples. The policy does not list the substances to be screened. The policy establishes a lower threshold for a positive alcohol test than Iowa Code section 730.5(9)(e) authorizes. The post-accident testing provision does not track with Iowa Code section 730.5(8)(f).

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). The administrative law judge notes that the employer did not submit the written test result for the administrative law judge's review. The administrative law judge further notes that the employer failed to present testimony from those members of Meints Construction who had contact with Mr. Jennings in connection with the drug test and/or discharge.

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. The Code section sets forth requirements regarding written drug and alcohol testimony policies, requirements regarding testing procedures, and requirements regarding notice to be given to 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. In Harrison, the employer had not complied with the Code requirements of providing written notice to the employee, by certified mail, of his right to a second test.

The evidence in the record establishes that the employer’s written drug testing policy does not come close to complying with the requirements of Iowa Code section 730.5(9). The evidence in the record fails to establish that the testing procedure itself complied with the requirements of Iowa Code section 730.5(7). The evidence in the record establishes that the employer did not comply with the notice requirements set for in Iowa Code section 730.5(7)(i)(1). Given the employer’s failure to comply with the requirements of Iowa Code section 730.5, the drug test that prompted Mr. Jennings’ discharge was an illegal test. Because the drug test was illegal, the administrative law judge concludes that the evidence in the record fails to establish misconduct in connection with the employment.

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

DECISION:

The Agency representative’s December 12, 2007, reference 01, decision is reversed. 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs