IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BRIAN L STARKEY
Claimant

SWIFT PORK COMPANY
Employer

APPEAL NO. 14A-UI-00481-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/27/13
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

Brian Starkey filed an appeal from the November 19, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on February 5, 2014. Mr. Starkey participated. Luis Meza represented the employer. Department Exhibits D-1 and D-2 were received into evidence.

ISSUE:

Whether the appeal was timely. Whether there is good cause to treat the appeal as timely.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On November 18, 2013, Brian Starkey and the employer participated in a telephonic fact-finding interview with a Workforce Development claims deputy. On November 19, 2013, Mr. Starkey went to the Marshalltown Workforce Development Center and delivered an appeal letter to the Center staff. On November 19, 2013, Iowa Workforce Development mailed a copy of the November 19, 2013, reference 01, decision to Mr. Starkey's last-known address of record. Mr. Starkey received that decision on or about November 22, 2013. The decision contained a warning that an appeal from the decision must be postmarked by November 29, 2013 or received by the Appeals Section by that date. After Mr. Starkey received the unemployment insurance decision in November, he took no further action on the matter until January 15, 2014. On that day, Mr. Starkey went to the Marshalltown Workforce Development Center, completed an appeal form, and delivered it to the Workforce Development Center staff. The Center staff faxed Mr. Starkey's appeal to the Appeals Section that same day. The Appeals Section received the appeal on January 15, 2014. Mr. Starkey wrote the following at the start of his appeal statement:

> I came to local Workforce development office and filed for appeal mid november the day after my phone interview. It appears my appeal has been lost. The appeals office told me to right this to let you know. (I was told it could take up to a month).

Mr. Starkey was employed by Swift Pork Company, also known as JBS, from 2006 until October 23, 2013, when the employer suspended him in connection with a post-accident drug test. The employer's written drug testing policy provided for post-accident drug testing. The policy called for termination of the employment in the event of a positive drug test result. The employer's policy listed the controlled substances to be screened and those substances included cocaine and amphetamines. On October 23, 2013, Mr. Starkey cut his hand in the course of performing his duties and in the injury required medical treatment. Prior to taking Mr. Starkey to the emergency room for medical treatment, the employer's nursing staff had Mr. Starkey provide a urine specimen for drug testing. Mr. Starkey provided the specimen. The specimen was collected as a single specimen, not a split specimen. The employer does not know what specific training the nursing staff had in drug testing or in discerning whether a person was under the influence of alcohol or drugs. The employer's staff did a preliminary screen of the urine specimen and concluded that the specimen was positive for amphetamine. The employer then forwarded the specimen to a lab for confirmatory testing. After Mr. Starkey received medical treatment on October 23, 2013, the employer suspended him from the employment pending receipt of the confirmatory drug test result.

On October 29, 2013, the employer received a drug test result from the lab to which the employer had sent the specimen. The lab reported that the test was positive for cocaine and negative for other substances including amphetamine. No medical review officer contacted Mr. Starkey before the lab reported the positive result to the employer.

On October 31, 2013, the employer summoned Mr. Starkey to a meeting. The employer told Mr. Starkey that he was discharged from the employment based on the positive drug test. During the discussion, the employer told Mr. Starkey that he could have the specimen that he had provided on October 23, 2013 retested and that cost would be $75.00. The employer had Mr. Starkey sign a document acknowledging the same.

The employer did not send notice of the drug test result to Mr. Starkey by certified mail, return receipt requested. The employer did not send notice to Mr. Starkey, by certified mail, return receipt requested, of his right to have the remaining portion of a split specimen retested at the lab of his choosing, along with the cost of such testing, a statement that the cost would be the same for Mr. Starkey as it would be for the employer, or providing a deadline for Mr. Starkey's request for additional testing.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6-2 provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving

> section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs “a” through “h”. Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The ten-day deadline for appeal begins to run on the date Workforce Development mails the decision to the parties. The "decision date" found in the upper right-hand portion of the Agency representative's decision, unless otherwise corrected immediately below that entry, is presumptive evidence of the date of mailing. Gaskins v. Unempl. Comp. Bd. of Rev., 429 A.2d 138 (Pa. Comm. 1981); Johnson v. Board of Adjustment, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

An appeal submitted by mail is deemed filed on the date it is mailed as shown by the postmark or in the absence of a postmark the postage meter mark of the envelope in which it was received, or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion. See 871 AC 24.35(1)(a). See also Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983). An appeal submitted by any other means is deemed filed on the date it is received by the Unemployment Insurance Division of Iowa Workforce Development. See 871 IAC 24.35(1)(b).

The weight of the evidence in the record establishes that Mr. Starkey hand-delivered an appeal letter to the Marshalltown Workforce Development Center on November 19, 2013, the same day the unemployment insurance decision was mailed to him. Mr. Starkey delivered his appeal letter after the fact-finding interview, but before he received a copy of the decision he intended to appeal. The weight of the evidence indicates that the agency misplaced Mr. Starkey’s appeal after he delivered it to the agency. The weight of the evidence establishes a timely appeal. The administrative law judge had jurisdiction to rule on the merits of the appeal.

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) alone. 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 notice requirements set forth at Iowa Code section 730.5(7)(i), the test could not serve as a basis for disqualifying a claimant for benefits.

The evidence in the record establishes a discharge that was based on an illegal drug test. There are several problems with the employer's case. The employer presented insufficient evidence to establish that the personnel who were involved in collection of the urine specimen had the training required by Iowa Code section 730.5(9)(h). The specimen was not split at the

time of collection as required by Iowa Code section 730.5(7)(b). No MRO interviewed Mr. Starkey as required by Iowa Code section 730.5(7)(c)(2). Perhaps most importantly, the employer did not comply with the notice requirements in Iowa Code section 730.5(7)(i). The Code requires that the employer notify the employer by certified mail, return receipt requested, of the results of the test and the right to request and obtain a confirmatory test of the secondary sample at a lab of the employee's choosing, at a fee comparable to the employer's cost, and by notice to the employer no later than seven days from the mailing date of the notice mailed by the employer to the employee. The failure to provide the written notice by certified mail, return receipt requested, was sufficient to cause the test not to be authorized by the statute, such that it could not be used as the basis for disqualifying Mr. Starkey for unemployment insurance benefits.

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

DECISION:

The claimant's appeal was timely. The Agency representative's November 19, 2013, 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/css