IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CHAD E BRUMMOND Claimant	**APPEAL NO. 11A-UI-04283-JTT**
	ADMINISTRATIVE LAW JUDGE DECISION
KERRY INC Employer	
	OC: 03/06/11 **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Chad Brummond filed a timely appeal from the March 30, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 28, 2011. Mr. Brummond participated. Heather Hobert, Human Resources Representative, represented the employer. Exhibits One, 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: Chad Brummond was employed by Kerry, Inc., as a full-time food production worker from June 2010 until February 28, 2011, when the employer discharged him based on a positive breath alcohol test. Mr. Brummond last performed work for the employer during an overnight shift that started at 11:00 a.m. on February 23, 2011 and that was scheduled to end at 7:00 a.m. on February 24, 2011. On that evening, Mr. Brummond suffered a torn muscle while performing lifting duties at work. The employer treated the matter as a worker's compensation matter. The employer took Mr. Brummond to the Emergency Room at Allen Hospital for evaluation and treatment. While at the Emergency Room, a nurse gave Mr. Brummond two breath alcohol tests. The first test was performed at 3:50 a.m. and provided a breath alcohol content of .066 grams of alcohol per 210 liters of breath. The second test was performed at 4:08 a.m. and provided a .061 result. Mr. Brummond was provided with a copy of the breath test results, as printed by the testing device, while he was still at the hospital on February 23.

Tracy Ginger, one of the production supervisors, interviewed Mr. Brummond on February 24, 2011. During the interview, Mr. Brummond admitted to consuming alcohol prior to his shift. Mr. Brummond had been drinking vodka immediately prior to his shift. At that point, the employer suspended Mr. Brummond. On February 28, Alex Cross, Production Manager, notified Mr. Brummond that he was discharged from the employment based on the positive breath alcohol tests.

The employer has a written Alcohol and Controlled Substances Abuse Policy. Mr. Brummond received a copy of the policy during his employment. The policy prohibited employees from reporting for work with alcohol in their system. The policy provided for post-accident drug testing where medical treatment was needed. The policy provided for breath alcohol testing. While the policy indicated that drug testing would be performed by a certified lab, the policy did not mention the qualifications of the persons who would be administering breath alcohol tests or the machines that would be used for the breath alcohol tests. The policy does not set forth a threshold concentration of breath alcohol that will be deemed a positive test result. The policy provided that, "An employee found to be in violation of this policy, with the exception of those in their first ninety (90) days of employment or in the final stages of corrective action, *may* be offered an opportunity for rehabilitation on the first offense." [Emphasis added.]

The employer also had a collective bargaining agreement that governed Mr. Brummond's employment. Mr. Brummond had been provided with a copy of the agreement, but discarded it without reading it. The collective bargaining agreement contained a provision that included "being under the influence of illegal drugs or alcohol on duty" provided grounds for discharge on the first offense. The employer cited the collective bargaining contract provision as the basis of the discharge when the employer notified Mr. Brummond that he was discharged from the employment.

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.
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> 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 administrative law judge concludes that the evidence fails to establish misconduct in connection with the employment for the following reasons. The employer's drug and alcohol testing policy fails to meet the requirements of Iowa Code section 730.5(9)(e), which requires that policy establish "a standard for alcohol concentration which shall be deemed to violate the policy. The standard for alcohol concentration shall not be less that .04, expressed in terms of grams of alcohol per two hundred ten liters of breath, or its equivalent." The employer drug and alcohol testing policy fails to meet the requirements of Iowa Code section 730.5(f)(2), because it does not include requirements governing evidential breath testing devices, alcohol screening devices, and the qualifications for persons administering initial and confirmatory testing, or whether these will be consistent with regulations adopted as of January 1999, by the United States Department of Transportation governing alcohol testing required to be conducted pursuant to the federal Omnibus Transportation Employee Testing Act of 1991. The evidence fails to establish that the testing procedure was reliable. The evidence fails to establish that the person giving the breath test was sufficiently trained and qualified to give the test. The evidence fails to establish that the equipment used for the test was sufficiently reliable. Because the policy and procedure does not comply with the private sector drug and alcohol testing statute, the drug test from February 23, 2011 was unlawful and cannot be used as a basis for disqualifying Mr. Brummond for unemployment insurance benefits.

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

DECISION:

The Agency representative's March 30, 2011, 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

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