

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARK A FITZGERALD

Claimant

APPEAL NO. 13A-UI-11756-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ASSOCIATED MATERIALS LLC

Employer

OC: 12/30/12

Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 4, 2013, reference 02, decision that allowed benefits. After due notice was issued, a hearing was started on November 13, 2013. Claimant Mark Fitzgerald participated on November 13, 2013. Mark Grenko represented the employer on that day. The administrative law judge adjourned the hearing on November 13, 2013 after concluding that Mr. Fitzgerald impaired, most likely by alcohol. The hearing recommenced on December 4, 2013. On that date, Mr. Grenko represented the employer and presented testimony through Jennifer Fredericks. On that date, Mr. Fitzgerald was not available at the number he had provided for the hearing and did not participate. After the hearing, the administrative law judge received a memo that the Appeals Section had received from Mr. Fitzgerald on December 2, 2013, indicating that Mr. Fitzgerald would not be available for the hearing on December 4, 2013 and indicating that he had secured new employment. Exhibits One through Four 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: Mark Fitzgerald was employed by Associated Materials, L.L.C., as full-time material handler from 2006 until September 17, 2013, when Mark Grenko, Human Resources Manager, discharged in connection a positive breath alcohol test from the previous day. Jennifer Fredericks, Receiving Supervisor, was Mr. Fitzgerald's immediate supervisor.

On September 16, 2013, Mr. Fitzgerald fell and injured his face on his way from the employer's parking lot into the employer's facility to start his shift. Mr. Fitzgerald was bleeding from his face when he reported to his work area. Coworkers summoned Ms. Fredericks to the area. When Ms. Fredericks arrived, she observed that Mr. Fitzgerald was bleeding from his lips or mouth and that his glasses were broken. Mr. Fitzgerald advised that he had fallen on the steps in front of the employer's building. Mr. Fitzgerald had recently told Mr. Fredericks of another falling

incident. In speaking with Mr. Fitzgerald, Ms. Fredericks observed that Mr. Fitzgerald did not know what day it was and had trouble answering simple questions. Ms. Fredericks observed that Mr. Fitzgerald's eyes were red. Mr. Fitzgerald agreed to allow Ms. Fredericks to transport him the emergency room.

Ms. Fredericks decided to have Mr. Fitzgerald submit to breath alcohol testing while he was at the emergency room. Ms. Fredericks has no training in drug or alcohol testing or in discerning whether a person is under the influence of alcohol or drugs. At 8:34 a.m., Mr. Fitzgerald provided a breath specimen that tested .276 grams of alcohol per 210 liters of breath. At 8:51 a.m., Mr. Fitzgerald provided a second breath specimen that tested .279 grams of alcohol per 210 liters of breath. The health care provider then checked the calibration on their breath testing device and determined that it was calibrated correctly. Ms. Fredericks wanted to transport Mr. Fitzgerald back to the workplace, but Mr. Fitzgerald refused. The emergency room staff kept Mr. Fitzgerald at the emergency room so that he could sober up.

On September 17, 2013, Mr. Fitzgerald called in an absence. Later that day, Mr. Grenko called Mr. Fitzgerald and notified him that he was discharged from the employment based on the positive breath alcohol test. While Mr. Grenko has past training in drug and alcohol testing and discerning whether a person was under the influence of alcohol or drugs, his most recent training had occurred two years prior to Mr. Fitzgerald's drug and alcohol testing.

The employer had written Standards of Conduct that indicated an employee would be discharged from the employment if the employee was intoxicated or under the influence of alcohol or a controlled substance while at work. The employer had a separate Drug and Alcohol policy. The policy provided for reasonable suspicion and post-accident/injury drug and alcohol testing and indicated that an employee would be discharged from the employment if found to be under the influence of alcohol or drugs. The policy did not specify what breath alcohol concentration would be deemed a positive breath alcohol test. The policy did not specify what equipment would be used to conduct breath alcohol testing. Though the employer had about 94 employees at the facility where Mr. Fitzgerald worked, the employer's policy did not call for an opportunity to participate in alcohol rehabilitation in connection with a first-offense positive breath alcohol test.

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) 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." In order to conduct private sector drug or alcohol testing, the statute requires that the supervisory staff involved in requesting such tests undergo a minimum of two hours initial training on drug and alcohol testing and discerning whether a person is under the influence of alcohol or drugs and at least one hour of follow up training annually. The employer did not meet this requirement. The statute requires that the employer's policy specify that the breath alcohol concentration that would subject an employee to discharge would be .04 grams of alcohol per 210 liters of breath. The employer's written policy omitted such language. The statute requires that the employer's policy specify the testing procedure and the specific testing devices to be used. The employer's policy omitted such language. The evidence indicates that there was a reasonable suspicion basis for the testing as well as a post-accident basis for the testing. Because the employer had at least 50 employees, and due

to the length of Mr. Fitzgerald's employment, the statute required that the employer offer Mr. Fitzgerald an opportunity for rehabilitation upon a first offense positive breath alcohol test. The employer's policy omitted such language and the employer extended no such rehabilitation opportunity.

Due to the several deficiencies identified above concerning the testing, the supervisor training, and the written policy, the alcohol testing was not authorized by law and the positive breath alcohol test cannot be used as a basis for a finding of misconduct in connection with the employment or for disqualifying Mr. Fitzgerald for unemployment insurance benefits.

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

DECISION:

The Agency representative's October 4, 2013, reference 02, decision is affirmed. 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/css