

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DANE K JENSEN
Claimant

APPEAL NO. 07A-UI-05515-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**CLINTON FARM & FLEET INC BRANCH OF
STERLING FARM & FLEET INC**
Employer

**OC: 04/29/07 R: 04
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Dane Jensen filed a timely appeal from the May 21, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 14, 2007. Mr. Jensen participated personally and was represented by Brij Patnaik, H.E.L.P. Legal Assistance Intern. Marilyn Lovejoy, Human Resources Generalist represented the employer and presented additional testimony through Lance Weirsema, Store Manager. Exhibits One through Five, Seven, A and B 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: Dane Jensen was employed by Clinton Farm & Fleet/Sterling Farm & Fleet as a full-time assistant manager from May 10, 2004 until April 30, 2007, when Patty Hughes, Human Resources Manager, discharged him after a positive drug test. On April 25, 2007, Mr. Jensen accidentally broke a sprinkler system pipe at the employer's store while operating a forklift. Mr. Jensen and four or five other store employees repaired the pipe and cleaned the affected area. The cost of parts to repair the damage was approximately \$50.00. Mr. Jensen and Assistant Manager Rich Baker dedicated approximately three and half hours to the clean up. There is no indication that the incident resulted in additional cost or loss to the employer. At the time of the incident, Mr. Jensen asked Assistant Manager Rick Baker and Training Coordinator Tom Bueler whether they believed the incident involved sufficient loss to require that he should submit to a post-accident drug test. Both colleagues dismissed the idea. Mr. Baker indicated he thought the total loss approximated \$100.00. Mr. Jensen's conduct or demeanor had not given rise to a suspicion that he was under the influence of alcohol or a controlled substance. Later that evening, Mr. Jensen used the employer's website to report the incident.

On Thursday, April 26, Mr. Jensen was not scheduled to work, but went to the employer's store with his wife to do some shopping. While Mr. Jensen was at the store, Store Manager Lance Wiersema notified Mr. Jensen that he would need to submit to a drug test. Mr. Jensen reported to a testing facility and provided a urine specimen.

Mr. Jensen continued to report for work as scheduled. On Monday, April 30, Mr. Jensen received a telephone call from a Medical Review Officer (M.R.O.). The M.R.O. told Mr. Jensen that the specimen had tested positive for THC (Tetrahydrocannabinol). Mr. Jensen then told Mr. Wiersema that he had been informed the specimen had tested positive for THC. A short while later, Mr. Wiersema notified Mr. Jensen that he was suspended based on an admission of guilt. Mr. Wiersema requested Mr. Jensen's keys to the store. Mr. Wiersema told Mr. Jensen he would be hearing from the employer. On May 4, Mr. Jensen received a termination letter.

The employer has a written substance abuse policy contained in an employee handbook. The policy called for a post-accident drug test "[i]f the employee has caused or contributed to an accident that causes damage to property in an amount reasonably estimated at the time of the accident to exceed five hundred dollars." The employer's policy does not list the substances to be tested for, but references to "any Schedule I-V drug." Under a section concerning prescription drugs, the policy does refer to marijuana and heroin as Schedule I drugs the possession of which is illegal under Federal law. The employer's policy calls for the employee to be escorted to the testing facility. The policy does not require a split sample. The policy does not call for written notice of the positive test result to be provided to the employee unless the employee requests the same. The policy indicates that any subsequent test of the specimen would be at the employee's expense, but provides no additional information regarding the time frame in which a request for a subsequent test must be requested or what the fee for such a test might be. The policy leaves the determination of appropriate disciplinary action based on a violation of the policy to the discretion of the employer and indicates such action can be "up and including termination of 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.

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 substantially 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 Court ruled that the employer did not substantially comply with the notice requirements of Iowa Code section 730.5(7)(i)(1). The claimant was not informed in writing of this right to have a second confirmatory test done at his expense. He was not told that he could choose the laboratory to conduct the test or that he had seven days to make his decision. He was also given a significantly inflated price for the test.

The evidence in the record establishes that the employer's written policy fails to comply with several provisions of Iowa Code section 730.5. The policy does not adequately list the substances to be tested. The policy does not make explicit that the specimen is to be split. See Iowa Code section 730.5(7)(a). The Code requires that the employer's policy provide "uniform requirements for what disciplinary or rehabilitative actions" an employer will take against an employee as a result of positive drug test, whereas the employer's policy leaves discipline to the

discretion of the employer. See Iowa Code section 730.5(9)(b). The Code requires that the employer provide the employee, by certified mail, return receipt requested, notice of the test results and the right to request and obtain a confirmatory test and sets out procedure and protocol for the second test. The employer's policy references no such requirement. See Iowa Code section 730.5(7)(h). The employer's policy failed to comply with the Code requirements in additional aspects.

The drug test itself did not comply with the requirements of Iowa Code section 730.5. While the Code allows post-accident testing only if the property damage estimate exceeds \$1,000.00, the evidence in the record indicates that the property damage did not come anywhere close to that threshold. See Iowa Code section 730.5(8)(f). While the Code requires that the test occur "during, or immediately before or after, a regular work period," the test here occurred the day after the accident and on a day when Mr. Jensen was not scheduled to work. See Iowa Code section 730.5(6)(a). The employer did not comply with the notification requirements of Iowa Code section 730.5(7)(h). The test failed to comply with the Code requirements in additional aspects. The evidence in the record indicates that any admission uttered by Mr. Jensen was prompted by the illegal test and should not be considered in determining whether he was discharged for misconduct.

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

DECISION:

The Agency representative's May 21, 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