IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MARK L CARLSON
Claimant

AMERICOLD LOGISTICS LLC
Employer

APPEAL NO. 07A-UI-09726-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/09/07 R: 01
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Americold Logistics filed a timely appeal from the October 5, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on October 31, 2007. Claimant Mark Carlson participated. Robin Hovanasian of TALX UC eXpress represented the employer and presented testimony through Jodi Cain, Administrative Manager, and Dr. Stewart Hoffman, M.D. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Four 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 Carlson was employed by Americold Logistics as a full-time dock laborer from August 27, 2006 until September 5, 2007, when Jodi Cain, Administrative Manager, discharged him in connection with a positive drug screen. On August 27, 2007, Mr. Carlson suffered pain when a forklift being operated by a coworker pushed him into one or more pallets. Mr. Carlson initially declined medical attention. On August 31, 2007, Mr. Carlson's arm was still sore and Mr. Carlson requested medical attention. The employer arranged for Mr. Carlson to be seen by the employer's physician. The doctor visit occurred during Mr. Carlson's normal working hours. As part of the visit to the doctor, the employer's health care provider requested that Mr. Carlson provide a urine specimen for drug screening. Though the employer's doctor had determined there was not injury to Mr. Carlson, the employer had reported the matter to its workers' compensation insurance carrier, which paid for the doctor visit. The employer's insurance carrier had also prepared and submitted a first report of injury. Mr. Carlson provided a urine sample that was split into two and one portion of the split sample was forwarded to ChoicePoint for lab drug screen analysis. On September 4, the lab tested the sample, which tested positive for amphetamine. Medical review officer Dr. Marvin Levin, M.D., notified Mr. Carlson of the positive test result and interviewed Mr. Carlson regarding prescription and non-prescription drug use. Though Dr. Stewart Hoffman played no role in supervising or reviewing the lab analysis of

Mr. Carlson's urine specimen, the lab report bears Dr. Hoffman's signature and indicates Dr. Hoffman certified the lab result. Though Mr. Carlson denied any drug use, the medical review officer did not discuss with Mr. Carlson the possibility of having a second drug screen performed on the other portion of the split sample. On September 5, Ms. Cain learned of the positive drug screen and downloaded a copy of the lab report from the ChoicePoint website. Ms. Cain summoned Mr. Carlson and discharged Mr. Carlson from the employment.

The employer has a written alcohol and drug policy. The policy is set forth in an employee handbook. Mr. Carlson signed his acknowledgement of receipt of the handbook on August 22, 2006. The policy indicates the employer will perform "reasonable suspicion" drug testing "where an employee causes substantial damage to property, is involved in an incident resulting in injury to the employee or another person, or appears to be under the influence of alcohol and/or drugs." The policy also specifically references "post-accident" testing and states, "Any industrial accident or illness resulting in an injury or damage to company equipment will also be cause for discovery testing drug/alcohol use, and any positive result will result in discharge." The employer's policy lacks any reference to split sample testing, lacks any reference to providing written notice of the lab test result to the employee, and lacks any reference to the employee's right to have a second test performed on the other portion of a split sample. Though Ms. Cain offered Mr. Carlson a copy of the lab report at the time of termination, the employer did not mail Mr. Carlson a copy of the report by certified mail, or otherwise, and did not provide Mr. Carlson notice of his right to have another test performed on the other portion of the split sample.

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 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 even substantially comply with the notice requirements of Iowa Code section 730.5(7)(i)(1). In Harrison, 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 indicates that the drug test that prompted Mr. Carlson's discharge was an illegal test for several reasons. First, the written policy itself did not comply with the requirements of Iowa Code section 730.5. Second, the employer went forward with a test request despite the fact that the employer's doctor found no injury. Third, the medical review officer referenced as the certifying doctor on the lab report did not in fact review or certify the lab test. Fourth, the employer completely failed to comply with any of the notice requirements referenced in Iowa Code section 730.5 and in Harrison v. Employment Appeal Board.

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

DECISION:

The Agency representative's October 5, 2007, reference 01, 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw