IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

MISTY COENEN Claimant **WALMART INC** Employer	**APPEAL NO. 22A-UI-01356-JT-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/14/21** **Claimant: Respondent (1)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.5(14) – Marijuana or Controlled Substance

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 6, 2021, reference 01, decision that allowed benefits to the claimant, provided the claimant met all other eligibility requirements, and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on November 1, 2021 for no disqualifying reason. After due notice was issued, a hearing was held on February 21, 2022. Claimant participated. Kristan Blanding represented the employer and presented testimony through John Oldfather and Nancy Laymon. Exhibits 1 through 10 were received into evidence. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant (DBRO). The administrative law judge took official notice of the Iowa Workforce Development records (KFFV) indicating a fact-finding interview was scheduled for December 2, 2021 at 3:05 p.m. However, the fact-finding materials were unavailable for the administrative law judge's review at the time of the hearing.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.
Whether the discharge was based on marijuana or controlled substance use in the workplace.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed by Walmart, Inc. as a full-time Pharmacy Technician until November 2021, when the employer discharged her from the employment, based on a positive drug test.

The employer has an Alcohol and Drug Free Workplace Policy that the employer made available to the claimant from the start of the employment. The employer updated the policy in 2018 and made the updated policy available to the claimant. The employer had the claimant participate in computer based learning (CBL) modules that included training concerning the policy. The policy prohibited activities including "Reporting to work under the influence of drugs

that are illegal under federal or state law, or alcohol." The policy listed the substances to be screened. The list included amphetamines, marijuana and oxycodone among other controlled substances.

The Alcohol and Drug Free Workplace Policy called for "reasonable suspicion" drug testing, under the following circumstances:

> Reasonable suspicion screening
> If you exhibit behavior that reasonably causes Walmart to suspect that you are violating this policy, you must submit to a drug/alcohol screen. Reasonable suspicion may be based on:
> Observations of you while at work, such as direct observations of:
> Drug/alcohol use or misuse;
> Appearance or behaviors indicating drug/alcohol use or
> Significant changes or deterioration in work habits or performance;
> A report of drug/alcohol use from a reliable and credible source or that is independently corroborated;
> Evidence that you tampered with any drug/alcohol screen during your employment or
> Evidence that you have manufactured, sold, distributed, solicited, possessed an open container, used consumed or transferred drugs/alcohol with the intent to use while on Walmart property or while performing Walmart business or while operating Walmart's vehicle, machinery or equipment.

The Alcohol and Drug Free Workplace Policy indicated the employer could test "blood, urine, saliva, or breath for the presence of alcohol, drugs that are illegal under federal or state law, or prescription drugs used in an improper manner." The policy did not call for collecting urine specimens as a split specimen. The policy stated that a positive test would result in termination of the employment.

The Alcohol and Drug Free Workplace Policy did not call for automatically providing drug tested employees with a copy of the drug test result. Instead, the policy stated an employee must send a written request to the employer's Drug Screening Department in Bentonville, Arkansas, which would then send a copy to the claimant via certified mail within five days or receipt of the request.

The Alcohol and Drug Free Workplace Policy stated that an initial drug screen was positive, the testing laboratory would perform a second screen using the Gas Chromatography/Mass Spectrometry method. The policy stated that a medical review officer (MRO) was a licensed physician, would review the positive drug screen and that if the second screen was positive, the MRO would contact the employee to determine whether there may be a valid medical explanation for the positive results. The policy stated the employee would then have three days to present relevant medical information.

The Alcohol and Drug Free Workplace Policy included the following as the means by which an employee could challenge a positive drug/alcohol test:

> Challenging a positive drug/alcohol screen result
>
> You may challenge a positive drug/alcohol screen by notifying the MRO within 72 hours of receiving a positive result. You will not be allowed to provide a new specimen. A second test of the same specimen will be conducted by a different government certified

> laboratory. You must pay for all costs associated with the review. The MRO will report the result of the confirmed screen to you. If the positive result is reversed during the challenge process, you will be reinstated. Walmart will reimburse all costs initially borne by your and will pay you for any scheduled time missed before you were reinstated. If the presence of the previously detected prohibited substance is confirmed, you will remain terminated, and will not be eligible for rehire.

On October 8, 2021, an Iowa prosecuting attorney notified John Oldfather, Walmart Global Investigator 3, of text messages law enforcement had obtained from the claimant's phone via a search warrant targeting the claimant's husband. The search warrant had no connection with the claimant's employment. The fruits of the search warrant included a heated text message exchange between the claimant and her spouse on February 24, 2021 and a cursory text message exchange between the claimant and a person named Ryan on June 8, 2021. Controlled substances were a topic of discussion in both text message exchanges. In both instances, the other participant, rather than the claimant, raised the topic. The claimant made no admission to unlawful use or possession of controlled substances during the text exchanges. The employer decided the text message correspondence received from the prosecutor constituted a report of drug use from a reliable and credible source. Based solely on these text messages; one from February 2021 and one from June 2021, the employer decided to interview the claimant and to subject the claimant to drug testing under the employer's "reasonable suspicion" drug testing policy. The employer had not observed anything in connection with the claimant's employment that would indicate the claimant was under the influence of alcohol or a controlled substance, in illegal possession of a controlled substance, or that the claimant had abused or misappropriated any controlled substance in connection with her pharmacy technician duties.

On October 22, 2021, a full 13 days after receipt of the text messages, the employer requested that the claimant submit to drug testing. Mr. Oldfather and Nancy Laymon, Market Health and Wellness Director, made the request that the claimant submit to drug testing. Mr. Oldfather had not received any training within the prior decade in discerning whether someone was under the influence of alcohol or drugs. Ms. Laymon had never received such training.

The employer had a manager transport the claimant to a local medical clinic where the claimant provided a urine specimen for testing. The specimen was collected as a single specimen and not a split specimen. After the claimant provided the urine specimen, the manager transported the claimant back to the Walmart store. The employer then suspended the claimant pending receipt of the result of her drug test.

Days after the claimant provided a urine specimen for testing, a lab representative other than a medical review officer contacted the claimant to discuss the positive drug test result. The claimant had tested positive for amphetamine/methamphetamine, oxycodone/oxymorphone, and marijuana. During the discussion with the lab representative, the claimant speculated that she may have been exposed to amphetamine/methamphetamine a week prior to the drug test. During the discussion with the lab representative, the claimant asserted she had a prescription for oxycodone.

On November 2, 2021, the employer mailed a termination letter to the claimant by certified mail. The employer did not provide the claimant with a copy of the drug test result/report. The employer did not mail notice to the claimant, by certified mail return receipt requested or otherwise, of her right to have a split portion of the urine specimen tested at a laboratory of her choosing and at a cost comparable to the employer's cost of the first test.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> a. The disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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 Iowa Admin. Code r.871 -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).

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 notice requirements concerning the right to additional testing of the collected specimen, the employer had not substantially complied with the statute and the test could not serve as a basis for disqualifying a claimant for benefits. Iowa has recently enacted Iowa Code Section 96.5(14), which reinforces that if a claimant tests positive for controlled substances pursuant to testing under Iowa Code section 730.5 or other testing procedure authorized under federal or state law, the claimant would be disqualified for unemployment insurance benefits.

The evidence in the record establishes a discharge for no disqualifying reason. The employer failed to comply with several aspects of Iowa Code section 730.5.

Iowa Code section 730.5(9)(h) provides as follows:

> In order to conduct drug or alcohol testing under this section, an employer shall require supervisory personnel of the employer involved with drug or alcohol testing under this section to attend a minimum of two hours of initial training and to attend, on an annual basis thereafter, a minimum of one hour of subsequent training. The training shall include, but is not limited to, information concerning the recognition of evidence of employee alcohol and other drug abuse, the documentation and corroboration of employee alcohol and other drug abuse, and the referral of employees who abuse alcohol or other drugs to the employee assistance program or to the resource file maintained by the employer pursuant to paragraph "c", subparagraph (2).

Neither Mr. Oldfather nor Ms. Laymon, the supervisory personnel of the employer involved with drug or alcohol, had the training the statute required before the employer was authorized to conduct drug testing under the statute.

The employer lacked a reasonable suspicion basis for subjecting the claimant to drug testing. See Iowa Code section 730.5(1)(i). The employer concedes there was no other basis for the test than the call from the prosecutor and text messages from the prosecutor. The text messages from February 2021 and June 2021 did not indicate that claimant was a drug user. Accordingly, neither the text messages nor the call from the prosecutor constituted "A report of alcohol or other drug use provided by a reliable and credible source." See Iowa Code section 730.5(1)(i)(3). Even if the text messages had indicated drug use in February 2021 and/or June 2021, that would not provide a reasonable suspicion for conclusion of drug use on October 2021, four to eight months later. In addition, the employer's receipt of information on October 8, 2021 does not provide a reasonable suspicion for a test that did not occur until two weeks later.

The employer's collection of the urine specimen did not comply with Iowa Code section 730.5(b), which provides:

> *b.* Collection of a urine sample for testing of current employees shall be performed so that the specimen is split into two components at the time of collection in the presence of the individual from whom the sample or specimen is collected.

The employer did not present evidence to rebut the claimant's testimony that the specimen was collected as a single specimen, rather than a split specimen.

The employer presented insufficient evidence to establish the claimant was given the opportunity to provide information to a medical review officer, that is, to a licensed medical professional, prior to the positive drug test report being forwarded to the employer. See Iowa Code section 730.5(1)(g) (defining medical review officer) and 730.5(7)(g) (regarding MRO review of test, chain of custody, and information provided by the test subject).

The employer wholly failed to comply with the statutory notice requirements set forth at Iowa Code section 730.5(7)(i), which provides:

> *i.* (1) If a confirmed positive test result for drugs or alcohol for a current employee is reported to the employer by the medical review officer, the employer shall notify the employee in writing by certified mail, return receipt requested, of the results of the test, the employee's right to request and obtain a confirmatory test of the second sample collected pursuant to paragraph *"b"* at an approved laboratory of the employee's choice, and the fee payable by the employee to the employer for reimbursement of expenses concerning the test. The fee charged an employee shall be an amount that represents the costs associated with conducting the second confirmatory test, which shall be consistent with the employer's cost for conducting the initial confirmatory test on an employee's sample.

For all the reasons set forth above, the employer's drug test of the claimant was an unauthorized, illegal drug test and, as such, cannot serve as the basis for a finding of misconduct in connect with the employment or the basis for disqualifying the claimant for unemployment insurance benefits. Because the claimant was discharged for no disqualifying reason, the claimant is eligible for benefits, provided she is otherwise eligible, and the employer's account may be charged.

DECISION:

The December 6, 2021, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

March 11, 2022
Decision Dated and Mailed

jet/scn