IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BRIAN C TENNEY
Claimant

WAL-MART STORES INC
Employer

APPEAL NO. 16A-UI-04197-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/20/16
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Brian Tenney filed a timely appeal from the April 4, 2016, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that the claimant had been discharged for misconduct in connection with the employment. After due notice was issued, a hearing was held on April 26, 2016. Mr. Tenney participated. Wesley Alexander, Co-Manager, represented the employer.

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: Brian Tenney was employed by Wal-Mart at the employer's Ames south location from 2001 until March 17, 2016, when the employer discharged him from the employment in response to a positive breath alcohol test. That store had 270 employees. Toward the end of the employment, Mr. Tenney worked as a photo lab technician. His immediate supervisors were Tim Lundberg, Photo Lab supervisor, and Assistant Manager Irit Caren. On March 14, 2016, Mr. Tenney was intoxicated in the workplace during his working hours. During his shift, Mr. Tenney possessed and consumed vodka. Mr. Tenney consumed the alcohol immediately outside the store, on Wal-Mart property. Mr. Tenney's intoxicated condition came to the employer's attention when Mr. Tenney fell in the store. Assistant Manager Josh Akins helped Mr. Tenney into a wheelchair. Ivar Vantol, an overnight supervisor, assisted with the situation. Mr. Akins contacted Co-Manager Wesley Alexander, who directed Mr. Akins to contact the employer's corporate reasonable suspicion hotline. Mr. Akins contacted the reasonable suspicion hotline and reported his observations of Mr. Tenney. Mr. Akins, Mr. Alexander and Mr. Vantol lacked training in drug and alcohol training and in discerning whether someone is under the influence of alcohol and/or drugs. The employer does not know what training the reasonable suspicion hotline representatives have in drug and alcohol training and in discerning whether someone is under the influence of alcohol and/or drugs. After Mr. Akin contacted the reasonable suspicion hotline for guidance, he had Mr. Tenney sign his consent to drug and

alcohol testing. A store representative then transported Mr. Tenney to Mary Greeley Medical Center in Ames, where Mr. Tenney submitted to breath alcohol testing. The employer does not know what machine was used to perform the breath alcohol testing. At about 8:30 p.m., Mr. Tenney provided a breath specimen that measured .373 BAC. Fifteen minutes later, Mr. Tenney provided a second breath specimen that measured .393 BAC. Mr. Tenney also provided a urine specimen for testing. On March 15, 2016, Co-Manager Wesley Alexander notified Mr. Tenney that he would be suspended until the employer received the drug and alcohol testing results.

On March 17, 2016, the employer received the breath alcohol testing results. On March 17, Mr. Alexander consulted with James Brungard, Market Human Resources Manager. On March 18, 2016, Mr. Alexander met with Mr. Tenney and offered to facilitate Mr. Tenney's participation in rehabilitation. Mr. Alexander provided Mr. Tenney with a pamphlet regarding the proposed rehabilitation program. Mr. Tenney told Mr. Alexander that he had "been down that road before—it does not help." At that point, Mr. Alexander discharged Mr. Tenney from the employment.

The employer has a written drug and alcohol testing policy. The written policy does not include requirements governing evidential breath testing devices, alcohol screening devices, and the qualifications for personnel administering initial and confirmatory testing. The written policy provides for alcohol testing, but does not establish a standard for alcohol concentration which shall be deemed to violate the policy or that the standard for alcohol concentration shall not be less than .04, expressed in terms of grams of alcohol per two hundred ten liters of breath, or its equivalent. The drug and alcohol testing policy also prohibits possession or consumption of drugs or alcohol on Wal-Mart property. The employer provided the policy to Mr. Tenney and Mr. Tenney was aware of the policy.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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 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."

The weight of the evidence establishes that the employer's written drug and alcohol testing policy and alcohol testing procedure failed to comply with the requirements of Iowa Code section 730.5. The administrative law judge notes that the employer failed to submit its policy or documentation of testing procedure as exhibits for the appeal hearing. The evidence fails to establish that the supervisory personnel had the training required by Iowa Code section 730.5(9)(h), which requires a two-hour initial training in drug and alcohol testing followed by an annual hour of such training. The employer's policy failed to specify the type of machine that would be used for alcohol testing or the measure of alcohol that would be deemed a positive test result. Iowa Code section 730.5(9)(e) requires both. While the employer has a rehabilitation program and offered participation in the program to Mr. Tenney, the evidence fails to establish that Mr. Tenney refused to participate. See Iowa Code section 730.5(9)(c).

Because the policy and testing protocol did not substantially comply with the requirements of the statute, the positive breath alcohol tests cannot serve as a basis for disqualifying Mr. Tenney for benefits.

Though the test result itself cannot serve as a basis for disqualifying Mr. Tenney for unemployment insurance benefits, Mr. Tenney's violation of the employer's policy prohibiting possession or consumption of alcohol on the employer's premises does provide a separate basis for a finding of misconduct in connection with the employment. The evidence establishes that Mr. Tenney knowingly and intentionally violated those policies. Mr. Tenney's possession of consumption of alcohol on the employer's property during his work hours demonstrated a willful and wanton disregard of the employer's interests. Accordingly, Mr. Tenney is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits.

DECISION:

The April 4, 2016, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account shall not be charged for benefits.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs