IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

PRINCE W SOE Claimant **TITAN TIRE CORPORATION** Employer	**APPEAL NO. 20A-UI-02338-JTT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/22/19** **Claimant: Respondent (1)**

Iowa Code section 96.5(2)(a) – Discharge

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 13, 2020, reference 03, decision that allowed benefits to the claimant provided he 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 February 24, 2020 for no disqualifying reason. After due notice was issued, a hearing was held on April 28, 2020. Claimant Prince Soe did not provide a telephone number for the appeal hearing and did not participate. Michael Gerlach represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibit 1 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: Prince Soe was employed by Titan Tire as a full-time tire builder from 2010 until February 24, 2020, when Michael Gerlach, Human Resources Manager, discharged him in response to a positive drug test. The employer has a written drug testing policy that includes a provision for random drug testing. The employer believes Mr. Soe would have received a copy of the drug testing policy at the time the most recent collective bargaining agreement went into effect. The policy indicates that a positive test result will result in discharge from the employment upon the first request. The policy lists the substances to be screened. The list includes cocaine as a substance to be screened. The employer maintains an excel spread sheet wit the names of active employees and an employee ID number associated with each named employee. The employer tells a third-party vendor, Midland Testing Services, the number of employees the employer wants to randomly test per month. Midland Testing Services sends a computer-generated random list of employee ID numbers to be drug tested. Through this process, the employer selected Prince Soe for random drug testing on February 6, 2020.

Toward the beginning of Mr. Soe's shift on February 6, 2020, Mr. Gerlach notified Mr. Soe that he had been selected to provide a urine specimen for random drug testing. Mr. Gerlach has undergone training in discerning whether a person is under the influence of alcohol or drugs. Mr. Gerlach completed a two-hour training session in 2018 and a one-hour session in 2019. Mr. Soe provided a urine specimen for drug testing. A Midlands Testing Services employee collected a urine specimen, but made an error in documenting the employee ID number associated with the specimen. The Midlands employee divided the specimen into two portions. The Midlands employee used one portion of the specimen to perform a 10-panel preliminary drug screen and concluded that Mr. Soe's specimen was positive for cocaine. The employer believes that this portion of the specimen was discarded after the 10-panel drug screen. The Midlands employee sent the second portion of the split-specimen to a drug testing lab for confirmatory testing. In response to the preliminary drug test positive result, the employer suspended Mr. Soe from the employment pending confirmatory testing of the portion Midlands forwarded to a drug testing lab.

On February 13, 2020, the employer received from the drug-testing lab written notice that Mr. Soe's specimen had tested positive for cocaine and another illicit substance. The employer believes a medical review officer spoke to Mr. Soe prior to reporting the positive test result to the employer. Between February 13 and 21, 2020, the employee and the testing company corresponded regarding the erroneous employee ID associated with Mr. Soe's drug test to correct the employee ID information. The employer did not mail to Mr. Soe written notice of the positive test result. The employer believes that is a responsibility that would fall to Midlands Testing Services. The employer did not mail to Mr. Soe notice of a right to request testing of a portion of the split-specimen at a lab of his choosing and at a price comparable to the employer's cost for testing the portion the employer sent to a lab. The employer believes this too is a responsibility that would fall to Midlands Testing Services. The employer scheduled a disciplinary proceeding for February 24, 2020 and discharged Mr. Soe from the employment on that date. The positive drug test result was the sole basis for discharge.

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:
>
> 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 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.
>
> 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).

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 notice requirement set forth in the statute, the test could not serve as a basis for disqualifying a claimant for unemployment insurance benefits. Failure to include the cost of confirmatory drug testing in the notice mailed to the employee violated Iowa Code section 730.5(7)(j)(1) because the omission of the cost denied the employee a meaningful opportunity to consider whether to undertake a confirmatory test. *Woods v. Charles Gabus Ford, Inc.,* (Iowa Ct. App. No. 19-002, Filed 1/9/2020, pp.8-9). The substantial compliance requirement, rather than a strict compliance requirement, applies to all mandates in Iowa Code section 750.5. *Dix et al vs. Casey's General Stores, Inc. and Casey's Marketing Company* (Iowa Ct. App. No. 18-1464, Filed 1/9/2020, p. 9).

The evidence in the record establishes a discharge for no disqualifying reason. The employer did not substantially comply with the requirements of Iowa Code section 730.5. There is insufficient evidence to establish that the specimen collection substantially complied with the

specimen collection requirements set forth at Iowa Code section 730.5(7)(a-d). The employer did not comply at all with the notice requirements set forth at Iowa Code section 730.5(7)(j)(1), which states as follows:

> 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. If the employee, in person or by certified mail, return receipt requested, requests a second confirmatory test, identifies an approved laboratory to conduct the test, and pays the employer the fee for the test within seven days from the date the employer mails by certified mail, return receipt requested, the written notice to the employee of the employee's right to request a test, a second confirmatory test shall be conducted at the laboratory chosen by the employee. The results of the second confirmatory test shall be reported to the medical review officer who reviewed the initial confirmatory test results and the medical review officer shall review the results and issue a report to the employer on whether the results of the second confirmatory test confirmed the initial confirmatory test as to the presence of a specific drug or alcohol. If the results of the second test do not confirm the results of the initial confirmatory test, the employer shall reimburse the employee for the fee paid by the employee for the second test and the initial confirmatory test shall not be considered a confirmed positive test result for drugs or alcohol for purposes of taking disciplinary action pursuant to subsection 10.

Based on the employer's failure to substantially comply with the statutory requirements applicable to private sector drug testing, and pursuant to the above-referenced appellant court rulings, the test and testing result associated with the specimen collected on February 6, 2020 cannot serve as a basis for a finding or misconduct in connection with the employment or for disqualification for unemployment insurance benefits. Mr. Soe is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The March 13, 2020, reference 03, decision is affirmed. The claimant was discharged on February 24, 2020 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

April 30, 2020
Decision Dated and Mailed

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