

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CLAIMANT**

Claimant

**APPEAL NO. 11A-UI-09226-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**EMPLOYER**

Employer

**OC: 06/19/11**

**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the July 12, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was commenced on August 4, 2011 and concluded on August 5, 2011. The claimant participated personally and was represented by counsel. The employer was represented by counsel and presented testimony through two witnesses. Exhibits One, Two, A, and B were received into evidence.

The undersigned administrative law judge, by his signature below, stipulates that the drug test information submitted in this case will only be made available to the parties to the proceeding in compliance with 49 USC § 31306(c)(7), which requires that test results and medical information of employees tested under the Omnibus Transportation Employee Testing Act of 1991 remain confidential.

**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: The claimant was employed as a motor coach operator/bus driver from 1997 until June 15, 2011, when the employer discharged her from the employment. The claimant's immediate supervisor was the Driver Supervisor. The claimant's bus driving duties required a commercial driver's license and subjected the claimant to mandatory random drug testing under federal Department of Transportation regulations. Both the employer's policy and the federal D.O.T. regulations required that the claimant be removed from her position in response to a positive drug test until she underwent substance abuse evaluation and treatment and was released by a Substance Abuse Professional return to the employment.

In May 2011, the claimant was randomly chosen to be tested for drugs under the employer's written policy and under federal requirements. On Friday, May 20, 2011, the Driver Supervisor notified the claimant that she had been randomly selected for drug testing and that she needed

to provide a urine specimen for testing that day. The claimant appeared at the collection facility that day and provided a urine specimen for testing. The collection facility split the sample to allow a test of the split sample. The collection facility then forwarded a portion of the urine specimen to a lab for analysis. The employer does not know the identity of the lab that analyzed the specimen.

On Monday, May 23, a medical review officer contacted the claimant and notified her that her urine specimen had tested positive for amphetamine. The medical review officer interviewed the claimant regarding any prescription medication she might have taken that might have influenced the test result. The claimant had not been prescribed medication. The claimant had instead taken someone else's prescription medication at a party on May 18.

On May 23, the medical review officer notified the employer that claimant's urine specimen had tested positive for amphetamine. The Driver Supervisor notified the claimant that she was placed on administrative leave without pay. On May 24, the employer met with the claimant for a pre-disciplinary hearing to discuss the positive drug test. The employer advised the claimant of her right to have the other portion of the split sample tested, but the claimant did not assert her right to a further test. The employer discussed with the claimant the requirement, under the employer's written policy and federal D.O.T. regulations, that she be evaluated by a Substance Abuse Professional and comply with any treatment recommendation. The employer discussed with the claimant that once she had completed the recommended treatment, the employer would meet with her for an additional pre-disciplinary hearing and would decide at that time whether she would be allowed to return to her driving duties. It was during this meeting that the claimant told the employer she had taken amphetamine at a graduation party.

The claimant was evaluated by a Substance Abuse Professional and complied with recommended treatment. On June 3, 2011, the S.A.P. notified the employer in writing that the claimant had successfully complied with his recommendations and opined that it would be appropriate to consider returning the claimant to a safety sensitive position. The S.A.P. recommended additional unannounced drug testing during the subsequent year. The claimant underwent an additional return-to-work drug test before meeting further with the employer.

On June 15, the claimant met for an additional pre-disciplinary hearing with the employer and the S.A.P. The employer reviewed the claimant's discipline history, including a discipline that had been issued April 22, 2011 for instances of prohibited cell phone use on April 7 and 8, 2011. In connection with those incidents, the claimant had initiated a cell phone call at a time when her bus was stopped, but had continued her conversation briefly after she started to operate her bus and the bus was in motion. The conduct was prohibited by the employer's work rules. The employer notified the claimant that the employer would follow up with a decision regarding whether the claimant would be allowed to return to work.

Immediately following the meeting, the claimant left a message for the Driver Supervisor on his work cell phone. The claimant told the Driver Supervisor that she was disappointed in the person he had become and that the employer had brought up "dirt" at the meeting that the employer was not supposed to bring up.

On June 16, the employer notified the claimant that she was discharged from the employment based on the positive drug test and the prior cell phone incidents. The employer concluded that the claimant had demonstrated a pattern of poor judgment and disregard for her safety and the safety of others. The employer also cited the claimant's telephone call to the Driver Supervisor and characterized it as insubordinate conduct.

## 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).

The Iowa Supreme Court has ruled that an employer cannot establish disqualifying misconduct based on a drug test performed in violation of Iowa's drug testing laws. Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003); Eaton v. Employment Appeal Board, 602 N.W.2d 553, 558 (Iowa 1999). As the court in Eaton stated, "It would be contrary to the spirit of chapter 730 to allow an employer to benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." Eaton, 602 N.W.2d at 558.

Iowa's drug testing laws, however, do not apply to employees who are required to be tested under federal law and regulations. Iowa Code § 730.5(2). Although the court has not addressed this issue, it is logical that the courts would likewise require compliance with federal law before disqualifying a claimant who was discharged for failing a drug test required by federal law and regulations.

The employer has presented insufficient evidence to establish that the drug test that triggered the claimant's discharge from the employment complied with the applicable federal law. The employer presented insufficient evidence to establish that the claimant was selected for random testing by means of the process prescribed by the federal law. The employer failed to provide any documentation from the collection and/or lab facility to establish proper collection, chain of custody, proper testing/analysis protocol, or a positive test result that exceeded the applicable cutoff concentration. See 49 CFR §§ 40.73, 40.81, and 40.87, 40.97, and 40.121 et seq. In the absence of evidence to establish compliance with the federal drug testing requirements, the drug test the employer administered cannot serve as the basis for a finding of misconduct to disqualify the claimant for unemployment insurance benefits.

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

#### **DECISION:**

The Agency representative's July 12, 2011, reference 01, decision is reversed. 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw