

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CAMMIE L CARTER**  
Claimant

**APPEAL NO. 15A-UI-01909-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**THOMAS L CARDELLA & ASSOCIATES INC**  
Employer

**OC: 01/18/15**  
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the February 3, 2015, reference 01, decision that that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged on January 12, 2015 for no disqualifying reason. After due notice was issued, a hearing was held on May 11, 2015. Claimant Cammie Carter participated. Michelle Hawkins of Equifax represented the employer and presented testimony through Dylan Hutton. 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: Cammie Carter was employed by Thomas L. Cardella & Associates, Inc., as a full-time customer care agent assigned to the Verizon account from January 5, 2015 until January 10, 2015, when the employer discharged her based on a positive pre-employment drug test. At the time Ms. Carter was interviewed on or about December 31, 2014, Jim Kincaid, Hiring Manager, notified her that she would have to participate in a pre-employment drug test and background check as conditions of her employment. Mr. Kincaid underwent training on drug testing and discerning whether a person is under the influence of alcohol or drugs. However, that training was not recent. Mr. Kincaid underwent training with the employer two or three years ago and underwent training in Verizon's protocol before that.

On January 5, 2015, Ms. Carter went to the workplace to collect paperwork she needed for the pre-employment drug screen and went to a specimen collection site, where she provided a urine specimen for testing. The specimen was collected as a split specimen. Once Ms. Carter had provided her specimen for testing, she reported that same day to begin her new employment. On January 9, 2015, a drug test lab notified the employer that Ms. Carter's urine specimen had

tested positive for alprazolam and benzodiazepines. Before the lab reported the result to the employer, a representative of the lab contacted Ms. Carter to notify her of the positive test result. When Ms. Carter appeared for work on Monday, January 12, 2015, her immediate supervisor told her she would have to leave and contact the employer's human resources department because there was a problem with her background check. Soon thereafter the supervisor telephoned Ms. Carter and told her the problem was a positive drug screen. The employer did not have further work for Ms. Carter. The employer did not mail a copy of the drug test result or mail notice to Ms. Carter of her right to have the other portion of the urine specimen tested at a lab of her choosing.

The employer has multiple drug testing policies. One of the policy documents indicates that a positive drug screen will result in discipline up to discharge from the employment. Another indicates that a positive pre-employment drug screen will result in the offer of the employment being withdrawn. The employer's client, Verizon, has its own drug testing policy. It is unclear which of these policies was actually provided to Ms. Carter.

### **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.

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). 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.

There are a number of problems with the employer's drug testing policy and protocol as it relates to Ms. Carter. First, Mr. Kincaid lacked the annual follow up training required by Iowa Code section 730.5(9)(h). Second, it is unclear exactly what policy, conflicting policies, the employer provided to Ms. Carter. The only policy statement offered as an exhibit for the hearing fails to set forth a uniform stand for actions to be taken in case of a confirmed positive drug test. See Iowa Code section 730.5(9)(b). Next, the employer called the test a pre-employment drug screen, but allowed the claimant to begin working before the employer had the result. Thus, the test was not actually pre-employment and there was no other basis for the test. See Iowa Code section 730.5(1)(h). Next, the employer has presented insufficient evidence to establish that a medical review officer took steps to provide an opportunity to the claimant to provide information that might affect the test. See Iowa Code section 730.5(7)(c)(2). Finally, the employer did not mail written notice to the claimant, by certified mail return receipt requested, of the positive test result until well after the employment had ended and never mailed notice to the claimant of her right to have the remaining portion of the specimen tested at a lab of her choosing. See Iowa Code section 730.5(7)(i)(1) and (2). For all these reasons, the drug test that was the basis for the claimant's discharge from the employment was not authorized by law and cannot serve as a basis for disqualifying her 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.

**DECISION:**

The February 3, 2015, 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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