IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TAMMI A MEYER
Claimant

WAL-MART STORES INC
Employer

APPEAL NO. 11A-UI-10559-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/03/11
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 July 28 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 30, 2011. Claimant Tammi Meyer participated. Dewayne Stuvy represented the employer and presented additional testimony through Holly Zuck and Joanne Decker-Kregel. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One and Two were received 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: Tammi Meyer was employed by Wal-Mart as a full-time floor associate assigned to the frozen dairy section from March 2010 until July 8, 2011, when Co-manager Dewayne Stuvy discharged her in response to a positive drug test. Ms. Meyer's work hours were 1:00 to 10:00 p.m. and her immediate supervisor was Department Manager Susan Larson.

On June 23, 2011, Ms. Meyer accidentally ran over her foot with a pallet jack and injured her foot. Ms. Meyer did not initially realize that her foot was injured in the incident. Ms. Meyer continued to perform her duties and went home at the end of her shift. Only after Ms. Meyer got home did she realize that she had injured her foot. When she got home and took off her shoe, she observed that her toe was bruised. Ms. Meyer's husband had a prescription for the pain medication oxycodone and gave Ms. Meyer a pill, which Ms. Meyer took.

Ms. Meyer's foot was still hurting the on June 24 when she appeared for work. Ms. Meyer spoke to an Assistant Manager, Lisa, who directed her to speak with a Co-manager, Brad. Ms. Meyer reported her injury to the Co-manager and completed appropriate paperwork. The employer treated the injury as a worker's compensation matter. Ms. Meyer requested medical evaluation of her foot injury. The Co-Manager told Ms. Meyer that she would be required to

submit to a drug test. It is unclear what training, if any, the Co-manager had concerning drug testing or discerning whether a person was under the influence of alcohol or drugs. The sole basis for the drug test was the workplace injury. The Assistant Manager, Lisa, transported Ms. Meyer to the Winneshiek Memorial Hospital for medical evaluation. While there, Ms. Meyer provided a urine specimen to the nurse on duty for drug testing. The specimen was collected as a split sample and forwarded to a lab for analysis. The health care provider placed Ms. Meyer's foot in a walking boot. Ms. Meyer returned to work on light duty and was assigned to work as a greeter. On June 27, Ms. Meyer was released to return to her regular duties and no longer wore the walking boot.

On July 5, Ms. Meyer received a letter advising her that her urine specimen had tested positive. The correspondence included a copy of the drug test result. The letter arrived by certified mail. The letter advised Ms. Meyer of her right to further testing of the other portion of the split urine specimen and of her obligation to provide notice and $125.00 payment within seven days if she desired to have the specimen tested. Ms. Meyer did not ask to have the specimen retested. Somewhere in this timeframe, Ms. Meyer had contact with a medical review officer. The medical review officer asked Ms. Meyer whether she had taken any controlled substances and Ms. Meyer said she had not. Ms. Meyer had not remembered the oxycodone pill her husband had provided to her on June 23. After speaking with the medical review officer, Ms. Meyer remembered the oxycodone pill. Ms. Meyer contacted the medical review officer and provided this information.

The employer learned of the positive drug test result on July 6. The information provided to the employer did not indicate the particular substance that triggered the positive test result.

The employer discharged Ms. Meyer when she appeared for work on July 8, 2011. The sole basis for the discharge was the positive drug test.

The employer has a written drug testing policy that was provided to Ms. Meyer in March 2010. The policy provides for drug testing of employees "involved in an accident or injury at work..." The policy provides that an employee "who consumes a prescription drug that is not prescribed in their name is subject to disciplinary action, up to and including termination." The policy indicates that employees "who fail a drug/alcohol test will be terminated..." The policy did not list the drugs to be tested and the employer did not otherwise notify Ms. Meyer of the drugs to be screened.

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 administrative law judge would note the candor and integrity Ms. Meyer displayed through her testimony. Ms. Meyer provided much of the necessary information the employer should have provided but did not.

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.

In this case, the employer was without authority under the law to conduct drug screening of Ms. Meyer because there is no indication that the Co-Manager Brad or Assistant Manager Lisa had the initial minimum two-hour training or the follow up annual training required by Iowa Code section 730.5(9)(h):

> 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).

In this case the employer did not comply with the requirement set forth in Iowa Code section 730.5(7)(c)(2) that "the employer shall provide an employee or prospective employee with a list of the drugs to be tested."

Because the employer was not authorized under the law to conduct the drug testing, the drug test result cannot be used as a basis for disqualifying Ms. Meyer for unemployment insurance benefits. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Meyer was discharged for no disqualifying reason. Accordingly, Ms. Meyer is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Meyer.

DECISION:

The Agency representative's July 28 2011, 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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