IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

RONALD E STINSON
Claimant

CRESTVIEW ACRES INC
Employer

APPEAL NO. 13A-UI-11246-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/01/13
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Ronald Stinson filed a timely appeal from the September 24, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 30, 2013. Mr. Stinson did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participated. Harold McElderry represented the employer. The administrative law judge took official notice of the agency's administrative record (APLT) that documents the claimant's failure to provide a telephone number for the hearing. Exhibits One through Eleven 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: Ronald Stinson was employed by Crestview Acres, Inc., as a full-time certified nursing assistant from 2011 until August 28, 2013, when the employer discharged him for allegedly appearing for work under the influence of alcohol. The incident that triggered the discharge occurred on August 23, 2013. On that day, Leo Jennings, L.P.N., telephoned Harold McElderry, Administrator, at 10:22 p.m. and reported that Mr. Stinson had shown for work two hours late, was staggering in the workplace and appeared to be under the influence of alcohol. Mr. McElderry was at home at the time he received the call from the nurse and reported to the workplace at 11:00 p.m. Mr. McElderry spoke to Dorrin Graves, R.N., who reported that Mr. Stinson had been walking off balance, was slow to speak, and had watery eyes. Mr. McElderry summoned Mr. Stinson to a meeting in the facility's office. Mr. McElderry observed that Mr. Stinson's eyes were red and watery. Mr. McElderry observed that Mr. Stinson's utterance seemed to ramble. Mr. McElderry told Mr. Stinson of the nursing staff's concerns and observations about Mr. Stinson's appearance and behavior. Mr. McElderry asked Mr. Stinson whether he had been drinking. Mr. Stinson answered that he drinks every day and had consumed a single beer four hours prior to reporting for work. Mr. McElderry told Mr. Stinson that he assessed Mr. Stinson to be under the influence of alcohol. Mr. McElderry has not undergone training in drug or alcohol testing or

in discerning whether a person is under the influence of alcohol or controlled substances. Mr. McElderry told Mr. Stinson that pursuant to policy he would drive him home and that Mr. Stinson was suspended until the employer completed its investigation into the matter. Later that same day, Mr. McElderry collected written statements from Nurse Jennings and Nurse Graves. On August 28, 2013, the employer notified Mr. Stinson that he was discharged from the employment.

The employer has a written drug and alcohol free workplace policy. The employer had provided Mr. Stinson with a copy of the policy. The policy provides for reasonable suspicion drug testing. The policy provides that,

> An employee whose faculties are impaired during work hours due to the effects of the illegal use of a controlled substance, including the abuse of a legal drug, alcohol, or another substance, is subject to discipline up to and including termination, even for the first offense. However, if a drug test is done, discipline will be imposed only in accordance with the guidelines outlined below in (E).

In section E, the policy indicates that, "An employee's first confirmed positive drug test will result in the employee's termination." The section further indicates that the employee may be suspended pending the results of the drug test. The section further indicates:

> Unsafe Individuals. Any prospective or current employee who has a confirmed positive drug test, who has a confirmed positive drug test following rehabilitation or who has reported to work under the influence of alcohol, violates a major employer safety rule. A person who violates a major safety rule will be classified as "unsafe" and will be subject to termination or refusal of hire. Any unsafe person is not eligible for rehire for a period of one year following termination or refusal of hire.

The employer's drug and alcohol free workplace policy makes no reference to the level of alcohol that will be deemed a positive alcohol test. The policy makes no specific reference to the circumstances under which a person found to be under the influence of alcohol may be considered for rehabilitation upon a first offense of the policy. The policy makes no reference to what type of equipment will be used to obtain a breath, urine, or blood alcohol test result.

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) alone. 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 employer has a drug and alcohol testing policy. The policy calls for testing of the employee suspected to be under the influence of alcohol or drugs. They did not request that Mr. Stinson submit to drug or alcohol testing and cites as its reason Mr. Stinson's admission to consuming one beer four hours before he came to work.

Iowa Code section 730.5(7)(f)(2) provides as follows:

> (2) Notwithstanding any provision of this section to the contrary, alcohol testing, including initial and confirmatory testing, may be conducted pursuant to requirements established by the employer's written policy. The written policy shall include requirements governing evidential breath testing devices, alcohol screening devices, and the qualifications for personnel administering initial and confirmatory testing, which shall be consistent with regulations adopted as of January 1, 1999, by the United States department of transportation governing alcohol testing required to be conducted pursuant to the federal Omnibus Transportation Employee Testing Act of 1991.

Iowa Code section 730.5(9)(e) provides as follows:

> *e.* If the written policy provides for alcohol testing, the employer shall establish in the written policy a standard for alcohol concentration which shall be deemed to violate the policy. 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.

Iowa Code section 730.5(9)(h) provides as follows:

> *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).

The employer had a policy that called for testing of an employee suspected of being under the influence of alcohol, but the employer did not invoke or follow its own policy. While the employer had reasonable suspicion that Mr. Stinson might be under the influence of alcohol, the reasonable suspicion only provided the basis for the testing and did not provide sufficient basis for concluding that Mr. Stinson was is indeed under the influence of alcohol within the meaning of the law: .04 grams of alcohol per 210 liters of breath. Likewise, Mr. Stinson's admission that he had consumed one beer four hours prior to coming to work provided reasonable suspicion to request a test, but was insufficient to establish that Mr. Stinson was indeed under the influence of alcohol within the meaning of the law. The employer's drug and alcohol testing policy falls short of complying with the statute in several regards, including the requirement that that the policy set forth the threshold alcohol amount, .04, that will be deemed a positive alcohol test. So while the employer had reasonable suspicion that Mr. Stinson was under the influence of alcohol, the employer has not presented sufficient evidence to establish that Mr. Stinson was indeed under the influence of alcohol within the meaning of the law.

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

DECISION:

The agency representative's September 24, 2013, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he 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/css