

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STUART A ABLETT
Claimant

APPEAL NO. 13A-UI-00514-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DEE ZEE INC
Employer

OC: 12/16/12
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Stuart Ablett filed a timely appeal from the January 10, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on February 14, 2013. Mr. Ablett participated. Lacey Leichter, Human Resources Assistant, represented the employer.

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: Stuart Ablett was employed by Dee Zee, Inc., as a full-time machine operator from 2006 until December 14, 2012, when the employer discharged him based on a positive drug test. During his shift on December 7, 2012, Mr. Ablett went to speak with Barb Wright, Plant Supervisor, about his recent involuntary shift change. Mr. Ablett's newly assigned shift hours, effective, December 7, 2012, were 7:00 a.m. to 3:00 p.m. Mr. Ablett had previously been on the 11:00 p.m. to 7:00 a.m. shift. Mr. Ablett had gone to speak to Ms. Wright to request to return to the overnight shift because he had a ride for that shift but did not have a ride for the day shift.

While Mr. Ablett was speaking to Mr. Ablett, she asserted that Mr. Ablett had bloodshot eyes and appeared restless. Ms. Wright asked Mr. Ablett whether if he could pass a drug test. Mr. Ablett said no, that he had marijuana in his system. Mr. Ablett then asked to go home for the day and Ms. Wright approved the request.

At 3:05 p.m. on December 7, Kelli Gallagher, Director of Human Resources, telephoned Mr. Ablett at home. Ms. Gallagher directed Mr. Ablett to immediately appear at Concentra in Des Moines to provide a urine specimen for testing. Mr. Ablett explained that he did not have transportation to Concentra. Ms. Gallagher did not offer transportation to Concentra. Ms. Gallagher then terminated the conversation.

Mr. Ablett was next scheduled to work on December 10. During his shift on December 10, Mr. Ablett's supervisor transported him to Concentra so that Mr. Ablett could provide a urine specimen for drug testing. Mr. Ablett provided a urine specimen, which was split into two samples. Mr. Ablett returned to work on December 10 after providing the urine specimen and continued to work until December 14. On December 12 or 13, Mr. Ablett received a certified letter from the employer. The employer had attached a copy of the drug test report, which indicated a positive result for marijuana. The letter indicated that Mr. Ablett needed to contact the employer to request a new test at his expense of the other portion of the split sample if he disagreed with the test result. The letter said nothing regarding what a second test would cost Mr. Ablett. Mr. Ablett did not request a second test. The employer discharged Mr. Ablett effective December 14, 2012.

The employer has a written drug testing policy. Mr. Ablett had received a copy of the policy. The policy provided for reasonable suspicion drug testing. The policy listed the substances to be tested. The policy indicated that a positive test result would lead to discharge from the employment.

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 notes that the employer failed to present testimony from anyone with personal knowledge of the events that led to Mr. Ablett’s discharge from the employment. The employer had the ability to present such testimony. The employer also failed to present any documentary evidence. The employer submitted no drug testing policy, no documentation of the specimen collection and chain of custody, and no drug test result. The employer had that ability to present such evidence.

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.

The weight of the evidence indicates a defective drug test request and procedure that rendered the drug test used to discharge Mr. Ablett an illegal drug test that cannot serve as the basis for disqualifying Mr. Ablett for unemployment insurance benefits. First, the employer has failed to present sufficient evidence to establish that Ms. Wright had reasonable suspicion to believe that Mr. Ablett was under the influence of drugs at the time she asked whether he could pass a drug test or that Ms. Gallagher, relying on information from Ms. Wright, had reasonable suspicion. See Iowa Code section 730.5(1)(i)(1) and (2). Second, even if the employer had reasonable suspicion on December 7 to request a drug test on that date, that is not reasonable suspicion to request or require a drug test three days later on December 10. See Iowa Code section 730.5(1)(h). Next, Mr. Ablett was under no obligation to appear for a drug test on December 7 after he had been allowed to go home for the day, since the law requires that the employer, not the employee, provide transportation to and from the drug test. “An employer shall provide transportation or pay reasonable transportation costs to employees if drug or alcohol sample collection is conducted at a location other than the employee’s normal work site.” See Iowa Code section 730.5(6)(c). The employer presented no evidence regarding the collection process or testing procedure to establish that the procedure or the result was valid. See Iowa

Code section 730.5(7). The employer presented no evidence to indicate that a medical review officer contacted Mr. Ablett to discuss the test result and receive further information from Mr. Ablett. See Iowa Code section 730.5(7)(c)(2). Finally, the employer's letter to Mr. Ablett made no reference to the actual cost to Mr. Ablett if he requested a confirmatory test of the secondary sample. See Iowa Code section 730.5(7)(i)(1) and (2).

Because the drug test that led Mr. Ablett's discharge did not meet the requirements of the law, and therefore was not authorized by the law, the administrative law judge concludes that Mr. Ablett was discharged for no disqualifying reason. Accordingly, Mr. Ablett is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The Agency representative's January 10, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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