

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**JOSEPH M ZAIGER**

Claimant

**APPEAL NO. 18A-UI-01764-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**LAWRENCE F HANDLOS**

Employer

**OC: 01/08/17**

**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Joseph Zaiger filed a timely appeal from the January 29, 2018, reference 03, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Zaiger had voluntarily quit on December 28, 2017 without good cause attributable to the employer. After due notice was issued, a hearing was held on March 6, 2018. The hearing in this matter was consolidated with the hearing in Appeal Number 18A-UI-01765-JTT. Mr. Zaiger participated. Beth Handlos represented the employer and presented additional testimony through Mike Anthofer. The administrative law judge took official notice of the following Agency administrative records: DBIN, DBRO, and KCCO.

**ISSUE:**

Whether Mr. Zaiger separated from the employment for a reason that disqualifies him for unemployment insurance benefits or that relieves the employer's account of liability for benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Handlos Family Farm is a private farming enterprise owned by Lawrence and Doris Handlos. Their children, Brian Handlos, Chief Executive Officer, and Beth Handlos, Chief Operating Officer, manage the farming enterprise with assistance of Ms. Handlos' son, Jacob Best. Mr. Best has no formal title, but is a member of the senior management team. Joseph Zaiger was employed by Handlos Family Farms as a full-time construction/maintenance worker from June 2017 and last performed work for the employer on December 20, 2017. Mr. Zaiger performed work duties as part of a small construction/maintenance crew at any one of the employer's many farms as assigned. Mike Anthofer, Construction/maintenance Supervisor, was Mr. Zaiger's immediate supervisor throughout the employment. Mr. Zaiger's work hours were 7:00 a.m. to 5:00 or 6:00 p.m., Monday through Friday, and 7:00 a.m. to noon on Saturday.

Mr. Zaiger's separation from the employment occurred in the context of a drug test. The employer has a drug and alcohol testing policy set forth in an employee handbook. The policy prohibits use, manufacture and being under the influence of illegal drug at work. The drug testing policy provides for drug and alcohol testing that includes drug testing based on reasonable suspicion. The policy indicates that supervisory personnel involved in drug testing will participate in an initial two-hour training program and thereafter participate in a one-hour

training program annually. The policy states that employer will provide employees with a list of substances to be screened, but does not list the substances to be screened. The policy reserves for the employer discretion to determine discipline to be issued on a case-by-case basis in response to a positive drug test. Such discipline may include discharge from the employment or may include other consequences short of discharge. The policy states that an employee will be suspended without pay pending the outcome of the drug test and will be reimbursed for lost wages in the event the confirmatory test provides a negative test result. The policy references involvement of a medical review officer in the testing process. The policy indicates that an employee who tests positive for drugs will be notified in writing of the test result and the right to have the second portion of a split specimen tested by a lab of the employees choosing. The employer did not provide Mr. Zaiger with a copy of the employee handbook or the drug testing policy.

At about 4:00 p.m. on December 20, 2017, Beth Handlos went to where Mr. Zaiger and other members of the construction/maintenance crew were working and notified them that they had been selected to participate in a "random" drug testing. In truth, the employees had not been randomly selected by computer or otherwise to submit to testing. The decision to subject Mr. Zaiger and the others to drug testing was based solely on an allegation made by a member of the construction/maintenance crew, Sam, to Mr. Anthofer two or three days earlier. Sam had alleged that Mr. Zaiger and another construction/maintenance employee, Zach Vesper, had been smoking marijuana in a work trailer. Mr. Anthofer had informed Ms. Handlos of the coworker's allegation. Ms. Handlos did not wish to single out Mr. Zaiger or Mr. Vesper. For that reason, Ms. Handlos subjected the entire construction/maintenance crew including Mr. Anthofer to testing. She also subjected the feed mill manager and a commercial truck driver to testing. Seven employees in total participated in the drug testing. Mr. Zaiger is not a commercial truck driver and does not possess a commercial driver's license that would subject him to federal drug testing requirements. Ms. Handlos and the supervisors transported Mr. Zaiger and the others to New Opportunities, a substance abuse treatment provider in Audubon. At that location, Carol Bayer, Financial Literacy Counselor, collected urine specimens from Mr. Zaiger and the other six men with the assistance of one other person. The employer does not know what credentials Ms. Bayer or her assistant possessed, if any, to facilitate drug testing. At the time of the drug test request and testing procedure, Ms. Handlos had not undergone training in drug or alcohol testing or in discerning whether an employee was under the influence of alcohol or drugs. Neither the employer nor Ms. Bayer or her assistant provided Mr. Zaiger with a written list of drugs to be screened through the testing. However, Ms. Bayer announced that the test would screen 101 substances including marijuana, methamphetamine, and alcohol. Ms. Bayer and her assistant provided the men with specimen cups in which the men were to urinate to provide a urine specimen for testing. The rim of the cup contained a material that was supposed to react to the presence of drugs. Mr. Zaiger provided a urine specimen as directed. The specimen was not divided into a split specimen. Ms. Bayer notified Mr. Zaiger, Ms. Handlos, and Mr. Anthofer that Mr. Zaiger's urine specimen had tested positive in connection with the preliminary screen. Zach Vesper's specimen has also tested positive as part of the preliminary screen. Ms. Bayer deemed Mr. Anthofer's specimen to be negative for drugs and discarded the specimen.

At the brief meeting at which Ms. Bayer notified Mr. Zaiger and the employer that Mr. Zaiger's specimen had tested positive for marijuana, Ms. Handlos asked Ms. Bayer for guidance on what she could or should do next in connection with Mr. Zaiger's preliminary positive drug test. Ms. Bayer advised Ms. Handlos that she could suspend Mr. Zaiger for three days pending lab confirmation of the positive test result. Ms. Bayer told Ms. Handlos that she would usually expect a report back from the lab within that time frame, but that proximity to the holidays might cause delay in the lab's response. Ms. Handlos notified Mr. Zaiger that he was suspended for three days pending the confirmation testing of his specimen. Ms. Bayer packaged Mr. Zaiger's urine specimen and sent it to Alere, a drug testing facility located in Virginia. The employer does not know what credentials Alere has, if any, to perform drug testing.

After the employees were done at New Opportunities in Audubon, Mr. Anthofer and another supervisor transported Mr. Zaiger and the other employees back to the assigned workplace. At that point, it was about the end of the work day. Once Mr. Zaiger and Mr. Anthofer were back at the workplace, Mr. Zaiger offered Mr. Anthofer his keys to the employer's work trailers. Mr. Zaiger told Mr. Anthofer that his job was not going to dictate what he did after work. Mr. Anthofer did not accept the keys from Mr. Zaiger. Mr. Anthofer told Mr. Zaiger to hold onto the keys until they found out what needed to be done in connection with the drug testing. Mr. Zaiger retained the keys and left work at the end of the day to begin the three-day suspension. Mr. Anthofer was unsure how to proceed regarding Mr. Zaiger's employment status and assumed that Mr. Zaiger would remain off work at least through Tuesday, December 26 or until the employer received the confirmatory test result.

At the end of the three-day suspension period, Mr. Zaiger contacted Mr. Anthofer and asked whether he still had a job, whether he was going to lose his job, and what he should do. Mr. Anthofer responded that he did not know the answer to Mr. Zaiger's questions. Mr. Anthofer told Mr. Zaiger to contact Beth Handlos or Brian Handlos. Mr. Anthofer assumed Mr. Zaiger had contact information for those two and for Mr. Best. Mr. Zaiger did not have contact information for any of the three. Mr. Anthofer did not offer phone numbers and Mr. Zaiger did not ask for phone numbers. Mr. Zaiger attempted to locate a phone number for Beth Handlos and Brian Handlos in the Audubon phone book, but did not find such phone number. Mr. Zaiger went to a third-party company's office that the Handlos family members sometimes used, but no one was there.

Mr. Zaiger contacted Mr. Anthofer multiple times over the course of a week about whether and when he could return to work. During that contact, Mr. Anthofer expressed encouragement that Mr. Zaiger might at some point be allowed to return to the employment, but did not have an answer for Mr. Zaiger. Mr. Zaiger did not ask for phone numbers for Mr. Handlos, Ms. Handlos or Mr. Best. Mr. Anthofer did not offer any.

At some point during the week of December 31, 2017 through January 6, 2018, Mr. Zaiger contacted Iowa Workforce Development and established an "additional claim" for unemployment insurance benefits that was deemed effective December 31, 2017.

As of the morning of January 2, 2018, the employer had not yet received notice of the confirmatory test result. On that day, Beth Handlos contacted Carol Bayer and inquired about the test result. On that day, Ms. Bayer emailed Ms. Handlos the confirmatory test report from Alere. The test report indicated that the specimen had tested positive for marijuana. The test report gave no indication of whether a bona fide medical review officer had reviewed the test result or that a bona fide medical review officer had certified the result. No medical review officer had contacted Mr. Zaiger to discuss the test result. The employer did not mail written notice to Mr. Zaiger of the drug test result or of his right to request testing of a second portion of a split specimen.

At some point during the week or two that followed Mr. Zaiger's suspension, Zach Vesper returned to work. At some point, Mr. Vesper spoke to Mr. Anthofer about the need for another set of work keys and told Mr. Anthofer that he intended to make contact with Mr. Zaiger to retrieve Mr. Zaiger's keys. On January 12, 2018, Mr. Vesper went to Mr. Zaiger's home to retrieve the keys. During that contact, Mr. Zaiger asked Mr. Vesper how he had managed to go back to work. Mr. Vesper told Mr. Zaiger that he had called Brian Handlos and that Mr. Handlos had directed him to report to work. Mr. Zaiger did not ask Mr. Vesper for Mr. Handlos' contact information and did not make further contact with the employer. Instead, Mr. Zaiger accepted an offer of other employment on January 12, 2018 and began the new employment on January 15, 2018.

## REASONING AND CONCLUSIONS OF LAW:

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. Iowa Administrative Code rule 871-24.1(113)(c). A quit is a separation initiated by the employee. Iowa Administrative Code rule 871-24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 698, 612 (Iowa 1980) and *Peck v. EAB*, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See Iowa Administrative Code rule 871-24.25.

Iowa Administrative Code rule 871-24.32(9) provides as follows:

Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

The weight of the evidence in the record establishing a discharge, not a voluntary quit. The employer set the separation in motion on December 20, 2017, immediately after the preliminary drug testing, when the employer notified Mr. Zaiger that he would be suspended for three work days. Mr. Zaiger subsequently made a flip comment to Mr. Anthofer on December 20 that indicated he was ready to be done with the employment and offered his keys. Mr. Anthofer rejected Mr. Zaiger's offer of the keys. Mr. Zaiger agreed to keep the keys. In short, both men acknowledged in the moment that Mr. Zaiger was not voluntarily separating from the employment at that time and tacitly agreed to wait to see what happened next.

At the end of that three-day suspension period, Mr. Zaiger reasonably contact Mr. Anthofer about whether he could return to the employment. Mr. Zaiger could not simply return to the workplace because the workplace changed daily and Mr. Zaiger was dependent on the employer to tell him where the workplace was that day. The employer did not allow Mr. Zaiger to return at the end of the three-day suspension. Mr. Anthofer told Mr. Zaiger he did not know whether Mr. Zaiger could return. Mr. Anthofer directed Mr. Zaiger to contact Beth Handlos or Brian Handlos. Because the employer had initiated the suspension, because Mr. Zaiger had served the designated period of suspension, and because Mr. Zaiger had made contact with his supervisor to indicate an intent to return to the employment, it would be more reasonable to expect the employer to take the lead in communicating with Mr. Zaiger regarding his continued employment or lack of the same. Mr. Anthofer should have contacted Ms. Handlos, Mr. Handlos or Mr. Best, but Mr. Anthofer did not do that. Mr. Zaiger made a less than effective attempt to contact the employer. The matter then dragged out over the course of several days during which the employer made no attempt to initiate contact with Mr. Zaiger regarding his job status. Mr. Zaiger eventually reasonably concluded that he had been discharged from the employment, surrendered his keys when they were requested, applied for unemployment insurance benefits and located other employment.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 a discharge 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 notice requirement set forth in the statute, the test could not serve as a basis for disqualifying a claimant for benefits.

The evidence in the record establishes a suspension and discharge based on an illegal drug test. The employer's drug testing policy, the employer's request for the drug test, and the testing procedure all fall substantially short of the requirements set forth at Iowa Code Section 730.5. The policy reserved to the employer discretion to decide the particular discipline on a case-by-case policy, contrary to the statute's requirement of uniform consequences. The employer lacked the required training before the employer was authorized by the statute to perform private sector drug testing. There is insufficient evidence to establish the employer ever gave Mr. Zaiger a copy of the drug policy. The drug test was not random drug testing within the meaning of the statute. The employer lacked reasonable suspicion to request the test for two reasons. One, the request was based on an unsubstantiated allegation made by a coworker. Second, there was a gap of two to three days between the report of alleged conduct and the test request. The employer did not provide Mr. Zaiger with a list of substances to be screened. The evidence fails to establish that the party collected the specimen and performed the initial drug screen had the necessary credentials to perform drug testing. The specimen was not collected as a split specimen. The evidence fails to establish that the confirmatory lab had the necessary credentials to perform drug test analysis or that an appropriate chain of custody was maintained. No medical review officer contacted Mr. Zaiger to discuss the test result prior to reporting a positive result. The employer failed to mail notice to the claimant of the test result or of his right to additional testing of a split specimen.

Because the suspension and discharge were based solely on the unauthorized drug test, the administrative law judge concludes that Mr. Zaiger was discharged for no disqualifying reason. Accordingly, Mr. Zaiger is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

**DECISION:**

The January 29, 2018, reference 03, 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

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