IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KENNETH L SWEISBERGER
Claimant

GELITA USA INC
Employer

APPEAL NO. 14A-UI-04157-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/30/14
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 April 17, 2014, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged, based on an agency conclusion that the claimant had been discharged for no disqualifying reason. After due notice was issued, a hearing was held on May 8, 2014. Claimant Kenneth Sweisberger participated. Jeff Tolsma represented the employer and presented additional testimony through Lynn Schlesser. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant and received Exhibits One through Five into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview.

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: Kenneth Sweisberger was employed by Gelita USA, Inc. as a full-time warehouse employee from 1980 until April 3, 2014, when the employer discharged him based on a positive drug test and a workplace accident. Doug Ryan, Warehouse Supervisor, was Mr. Sweisberger's immediate supervisor. On March 26, 2014, Mr. Sweisberger was operating shuttle truck that had a trailer in tow. While Mr. Sweisberger was operating the unit, the trailer became detached from the shuttle truck. The shuttle-trailer unit had a history of coming apart on its own. The incident resulted in property damage that the employer estimated at $15,000.00 and that Mr. Sweisberger estimates at $3,000.00 to $4,000.00. In connection with the accident, the employer requested that Mr. Sweisberger submit to drug testing. The supervisory and management staff involved in requesting the drug test did not have recent annual training in drug testing or in discerning whether a person was under the influence of alcohol and drugs. The employer had a written drug testing policy. The employer had provided Mr. Sweisberger with a copy of a drug testing policy in 2000 when it was implement. Thereafter the employer

made revisions to the policy, but did not provide Mr. Sweisberger with a copy of the revised policy. Instead, the employer reviewed its drug testing policy with employees as part of annual mandatory training. The policy left the employer with discretion to decide what reprimand to issue to an employee in the event of a positive drug test. The policy provided for drug testing in the event of a workplace accident resulting in property damage $1,000.00.

On March 26, a supervisor transported Mr. Sweisberger to a medical clinic where Mr. Sweisberger provided a urine specimen for testing. Neither the employer nor Mr. Sweisberger knows whether the specimen was collected as a split specimen. The employer received the test result on March 31, 2014. The test result report indicated that the urine specimen had tested positive for amphetamines, methamphetamines, and marijuana metabolite. The employer notified Mr. Sweisberger on April 3, 2014 that he was discharged from the employment. The employer did not provide Mr. Sweisberger with a copy of the test result. The employer did mail Mr. Sweisberger a copy of the test result or mail to him a notice of his right to have another portion of the urine specimen tested at a lab of his choosing.

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 notice requirement set forth in the statute, the test could not serve as a basis for disqualifying a claimant for benefits. The notice required is notice mailed by certified mail, return receipt requested. Such written notice must notify the employee of the positive test result and notify the employee of his right to request a test of the second portion of the specimen at a lab of his choosing, at expense comparable to the employer's expense in connection with the initial test, and the employees obligation to notify the employer of the requested testing within seven days of the notice.

The drug test issued to Mr. Sweisberger did not substantially comply with the statute and cannot serve as a basis a finding of misconduct or a disqualification for benefits. The employer's supervisory and management staff involved in requesting the test lacked the training mandated by the statute. The employer's policy did not comply with the statutory requirement that it set for uniform discipline for violations of the policy. The employer had not provided Mr. Sweisberger with a copy of a revised policy. The evidence is insufficient to indicate that the specimen was collected as a split specimen. The employer did not comply with the statutory notice requirement, which lapse by itself was sufficient to make the drug testing illegal under the statute.

In light of the history of past problems with shuttle-trailer that were not attributable to Mr. Sweisberger, the evidence in the record is insufficient to establish that the accident that occurred in the workplace on March 26, 2014 was attributable to carelessness and/or negligence on the part of Mr. Sweisberger.

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

DECISION:

The claims deputy's April 17, 2014, reference 01, decision is affirmed. 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