

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RAYMOND A STAFFORD
Claimant

APPEAL NO. 15A-UI-10354-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OWEN INDUSTRIES INC
Employer

OC: 08/23/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Raymond Stafford filed a timely appeal from the September 11, 2015, reference 01, decision that disqualified him for benefits. After due notice was issued, a hearing was held on September 29, 2015. Mr. Stafford participated. Ron DeBord, Vice President of Human Resources, 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: Raymond Stafford was employed by Owen Industries as a full-time welder from 2005 until August 27, 2015, when the employer discharged him from the employment in response to a positive drug test. On August 19, 2015, Mr. Stafford experienced a workplace injury to his finger that required medical treatment. The employer transported Mr. Stafford to a medical facility where Mr. Stafford received medical treatment and submitted to drug and alcohol testing. The employer's supervisory staff involved in the tacit drug test request had undergone a two-hour training session on drug and alcohol testing in May 2015. The employer's written drug testing provided for post-accident drug testing. The policy listed the drug to be screened. The policy provided conflicting information regarding discipline. On the one hand, the policy indicated that the employer would determine the appropriate discipline that might include discharge from the employment. On the other hand, the policy referenced a zero tolerance for cannabinoids. Mr. Stafford had received a copy of the policy earlier in the employment. Mr. Stafford's urine specimen was divided into a split specimen and forwarded to a drug testing laboratory for confirmatory testing. Mr. Stafford returned to work on August 20, 2015 and continued to perform his regular duties up to the time of the discharge. Prior to reporting a positive drug test result to the employer, a medical review officer notified Mr. Stafford by telephone that his urine specimen had tested positive for marijuana and asked questions of Mr. Stafford to solicit information regarding any medications Mr. Stafford was taking. Mr. Stafford shared information regarding multiple prescription medications he was taking. None would have contained

marijuana or THC. On August 26, 2015, the medical review officer reported the positive test result to the employer. The employer then summoned Mr. Stafford to a meeting and notified him that he was discharged from the employment. Though the employer's drug testing policy indicated that a copy of the drug test result would be mailed by certified mail return receipt requested to an employee whose body specimen tested positive for drugs, the employer did not mail the test result to Mr. Stafford. Nor did the employer mail to Mr. Stafford, by certified mail return receipt requested, notice of Mr. Stafford's right to have the second portion of the urine specimen tested at a lab or Mr. Stafford's choosing at a cost to Mr. Stafford that would be comparable to the cost incurred by the employer for the first test. Instead, the employer handed Mr. Stafford a copy of the drug test result and spoke to him regarding additional testing or the split specimen.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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) 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." 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 notice requirements for the drug test, the test could not serve as a basis for disqualifying a claimant for benefits.

The evidence in the record fails to establish misconduct in connection with the employment. The employer's policy in many respects complies with the requirements of Iowa Code section 730.5. The policy provides inconsistent information regarding whether the employer will exercise discretion in deciding whether to discharge an employee in connection with a positive test result. See Iowa Code section 730.5(9)(b) (the policy must provide for uniform standards for actions that will be taken in case of confirmed positive test). The policy provided for post-accident drug testing. The supervisory personnel involved in the drug test request had the requisite training. The MRO took appropriate steps to solicit information from Mr. Stafford. But the employer's case falls short for two very important reasons. First, the employer failed to provide the formal notice to Mr. Stafford as required by Iowa Code section 730.5(7)(i)(1) and (2). That portion of the statute requires that the employer notify the employee by certified mail, return receipt requested, of the result of the test and the right to request and obtain a confirmatory test of the secondary sample at a certified lab of the employee's choosing, for a fee comparable to the employer's cost for the initial test. The notice must indicate that the employee has seven days from the date of the mailing of retesting rights notice to pay and request the additional testing of the split specimen. That failure to provide the statutorily mandated notice rendered the drug testing process and result illegal under Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003). Through the same fatal omission, the employer failed to comply with its own written policy. See Iowa Code section 750.5(9).

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

DECISION:

The September 11, 2015, 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

jet/pjs