

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CLAIMANT

Claimant

APPEAL NO. 19A-UI-09132-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EMPLOYER

Employer

OC: 01/13/19

Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the November 6, 2019, reference 01, decision that disqualified him for unemployment insurance benefits and that held the employer's account would not be charged for benefits, based on the deputy's conclusion that the claimant was discharged on September 25, 2019 for violation of a known company rule. After due notice was issued, a hearing was held on December 13, 2019. The claimant participated. Employer participated.

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: Employer performs safety-sensitive work on natural gas pipelines that are located in federal right of way areas. The work subject's employees to mandatory drug testing under United States Department of Transportation rule 49 CFR Part 40. The claimant was employed by employer as a full-time equipment operator from March 2019 until September 25, 2019, when the Human Resources Generalist discharged him from the employment for refusing to a federally mandated random drug test. Prior to beginning the employment with employer, the claimant had had a positive drug test while performing similar safety-sensitive pipeline work for another employer. The positive drug test subjected the claimant to subsequent random drug testing of increased frequency during the employer employment. The employer has a written drug testing policy that the employer provided to the claimant. The policy notified the claimant that he was subject to the federally-mandated drug testing and that refusal to submit to drug testing would result in discharge from the employment.

On September 23, 2019, the claimant was selected via a computer-based random selection process to undergo a random drug test. Shortly after the claimant arrived for work that morning, employer directed the claimant to report to a nearby medical facility to provide a urine specimen for drug testing and handed the claimant the documentation he would need to present to the

collection site staff to start the drug testing process. The claimant reported to the collection site as directed and provided the documentation to the collection site staff. When it was the claimant's turn to provide a specimen, the collection site staff first had the claimant wash his hands and then sent him into a nearby restroom with a male monitor to provide a urine specimen. Based on the claimant's prior positive test, he was subject to being monitored as he provided a urine specimen for testing. After the claimant was in the restroom for several minutes without producing a urine specimen, the male monitor had the claimant return to a waiting area where the claimant was instructed to drink water. The claimant consumed a cup of water and began to drink a second cup. The collection site staff had allowed the claimant to collect and access his cell phone while he consumed water and waited to make another attempt to provide a urine specimen. A few minutes later, the claimant conjured a bogus emergency that he asserted necessitated his immediate departure from the collection site. The claimant told the collection site staff that he had just received a text message on his phone that his mother may have had a stroke and that he needed to travel to Iowa City. Before the claimant left the collection site, he entered a restroom with the drinking cup the collection site staff had provided. The claimant urinated in the drinking cup to produce a diluted urine specimen. The claimant then left the adulterated specimen on the back of a toilet in the restroom. The claimant then left the collection site, returned the employer's truck to the workplace, and left the workplace. The claimant mentioned his bogus emergency to a supervisor, but neglected to contact employer about the purported need to leave the drug testing site. The claimant had employer's phone number in his cell phone. The collection site staff notified the employer of the claimant's departure from the collection site without completing the appropriate testing process. On September 25, 2019, the employer discharged the claimant from the employment for refusing to submit to the random drug testing protocol. Prior to discharging the claimant from the employment, the employer invited the claimant to produce the September 23 text message that he had asserted necessitated his departure from the collection site. The claimant asserted that he had accidentally deleted the text message.

REASONING AND CONCLUSIONS OF LAW:

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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The weight of the evidence establishes a discharge for misconduct in connection with the employment. The claimant's story about a text message concerning a family emergency that necessitated his immediate departure from the specimen collection site prior to completing the drug testing process is a blatant fabrication. The story is immediately suspect, given the drug testing context in which the purported emergency suddenly arose. The story takes a bizarre turn toward further implausibility with the addition of the peculiar means by which the claimant, while unmonitored, produced a diluted, adulterated urine specimen in a non-approved vessel in a purported effort to avoid being deemed to have refused the test. The fabricated nature of the

tall tale becomes blatant and undeniable when one adds in the “accidental” deletion of the critically important text message with two days after the message was purportedly received. The weight of the evidence establishes that the claimant knowingly and intentionally refused a federally-mandated drug test by failing to remain at the testing site until the testing process was complete. See 49 CFR Part 40, Section 40.191(2). The claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer’s account shall not be charged for benefits.

DECISION:

The November 6, 2019, reference 01, decision is affirmed. The claimant was discharged on September 25, 2019 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer’s account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/scn