

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**AARON M MCLARNAN**  
Claimant

**APPEAL NO. 13A-UI-09258-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CUSTOM-PAK INC – LP2**  
Employer

**OC: 07/14/13**  
**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 August 1, 2013, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on September 16, 2013. Claimant Aaron McLarnan did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Andrea Lawrence represented the employer. The administrative law judge took official notice of the agency's record (APLT) documenting the claimant's failure to provide a telephone number for the hearing. Exhibits One through Five were received into evidence.

**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: Aaron McLarnan was employed by Custom-Pak, Inc., as a full-time machine operator from July 2012 until June 12, 2013, when Andrea Lawrence, Human Resources Manager, discharged him from the employment for an alleged refusal to submit to a random drug test. Mr. McLarnan's work hours were 3:00 p.m. to 11:20 a.m., Monday through Friday. The employer has a written drug testing policy that includes random drug testing. The employer utilizes a third party, Clinton Occupational Health, to randomly select employees for drug testing by use of a computer software selection program. The policy indicated that an employee who tested positive for being under the influence of drugs would be subject to immediate discharge. The policy indicates that refusal to submit to drug testing would subject the employee to discharge from the employment. On June 11, 2013, the employer notified Mr. McLarnan during his shift that he had been selected for random drug testing. Representatives from Clinton Occupational Health were onsite at the employer's facility for purposes of collecting urine specimens for testing. The employer's staff members involved in enforcing the drug testing policy have two hours of annual training in drug testing and related issues.

At about 9:00 p.m. on June 11, 2013, the employer notified Mr. McLarnan that he had been selected for drug testing. The testing personnel designated a private restroom for Mr. McLarnan to use to provide the specimen. The testing personnel did not enter the restroom with Mr. McLarnan. At 9:15 p.m., Mr. McLarnan made his first attempt to provide a urine specimen for testing. Mr. McLarnan did not provide a urine specimen at that time. At 9:30 a.m., the personnel collecting urine specimens provided Mr. McLarnan with 40 ounces of water to drink. Mr. McLarnan attempted to provide a urine specimen at 9:56 p.m. and at 10:50 p.m. At 12:15 a.m., when Mr. McLarnan had not yet provided a urine specimen for testing, the testing personnel documented the failure to provide a specimen as a refusal to submit to drug testing. A medical review officer subsequently interviewed Mr. McLarnan to determine whether there was a medical basis for the failure to provide a urine specimen and determined there was not medical basis for it. The employer discharged Mr. McLarnan the next day.

### **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) 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.”

The weight of the evidence in the record fails to establish a refusal to submit to drug testing. The evidence indicates instead that Mr. McLarnan agreed to submit to testing and made multiple attempts to provide a specimen over the course of three hours. Mr. McLarnan’s *inability* to produce a specimen did not constitute misconduct in connection with the employment.

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

**DECISION:**

The agency representative’s August 1, 2013, reference 02, 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.

---

James E. Timberland  
Administrative Law Judge

---

Decision Dated and Mailed

jet/css