

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TRAVIS R FRUENDT**  
Claimant

**APPEAL NO. 15A-UI-02555-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**NORDSTROM INC**  
Employer

**OC: 02/01/15**  
**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 February 19, 2015, reference 01, decision that that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged on February 7, 2015 for no disqualifying reason. After due notice was issued, a hearing was held on March 31, 2015. The claimant participated. Lisa Harroff of Equifax represented the employer and presented testimony through Robin Pospisil and Joe Kuhn. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One and Two were received 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 and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with 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: The claimant was employed as a full-time information technology technician from 2010 until February 7, 2015, when the employer discharged him from the employment. On February 3, 2015, the employer had requested that the claimant submit to drug testing. The request for the drug test was based on reports from coworkers that the employer declines to identify. The claimant acquiesced in drug testing. Prior to the providing a specimen for testing, the claimant told a human resources representative, "I'm fucked." The human resources representative deemed the utterance unprofessional. After the claimant provided a urine specimen, the employer sent the claimant home pending further investigation.

The claimant's girlfriend also worked for the employer. After the employer requested the drug test, but before the claimant left to provide a specimen, the claimant notified his girlfriend of the situation. The claimant's girlfriend was at work at the time. The claimant's girlfriend then left

work early, ostensibly due to illness. The claimant's girlfriend later sent threatening messages to a colleague, whom she thought was the source of the allegation of drug use. There is no indication that the claimant directed the girlfriend to send the messages.

Later in the day on February 3, the human resources representative telephoned the claimant to summon him to a meeting the next day. The claimant had been on a call with his mother. At a time when the claimant thought he was on the line with his mother, he stated that he might not be working for the employer anymore because the employer had made him do a "pee test" that day. The human resources representative deemed the statement unprofessional.

On February 6, the employer met with the claimant. During the meeting, the claimant advised that he smokes marijuana for back pain. The claimant had been about to transition to another position pursuant to a promotion. At the time of the meeting, the employer notified the claimant that the promotion was rescinded.

On February 7, the employer notified the claimant that he was discharged. The employer advised the claimant that the discharge was based on coworker allegations that the claimant had been discussing smoking and selling marijuana, on unprofessional comments the claimant had made in conversations with the human resources representative, on the claimant distracting his girlfriend from her duties, and on the girlfriend's subsequent inappropriate conduct.

The employer has a written drug-free workplace policy that in many respects follows the requirements of Iowa Code section 730.5 regarding private sector drug testing. However, the policy reserved to the employer discretion to decide what discipline will be imposed in the event an employee has a positive drug test result.

The employer was aware at the time the employer discharged the claimant from the employment on February 7, 2015 that the claimant urine specimen had come back negative for drugs. The employer did not share this information with the claimant prior to discharging him from the employment.

#### **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 evidence in the record fails to establish a reasonable suspicion basis for the drug test request on February 3, 2015. At the time the employer requested the test, the employer had only mere assertions from unnamed coworkers that the claimant has discussed smoking and selling marijuana. In addition to the lack of reasonable suspicion, the employer's drug testing policy failed to substantially comply with the requirements of Iowa Code section 730.5 because the policy did not provide for uniform discipline. Everything that flowed from the flawed request

for the drug specimen was so-called fruit from the poisonous tree. The employer has presented insufficient evidence to establish anything untoward about the claimant's communication with his significant other. It would not be unreasonable or inappropriate for the claimant to tell his significant other that he had been asked to submit to drug testing. The employer has presented insufficient evidence to establish that the claimant put his girlfriend up to the conduct she engaged in after the claimant told her he had been asked to submit to drug testing. The claimant's comments to the employer prior to the drug test or uttered inadvertently on the telephone do not rise to the level of misconduct. Though the claimant admitted to drug use, the evidence fails to establish any connection between that conduct outside of work and the employment. The employer lacked a work rule that would have subjected the claimant to discipline for drug use outside of work absent proof, pursuant to an authorized drug test, that the claimant had such substance in his body. The drug test was not authorized under the law. The drug test was negative.

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

**DECISION:**

The February 19, 2015, 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

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