IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CANUTO R AMAYA-RODRIGUEZ
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL NO. 11A-UI-04248-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/06/11
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Canuto Amaya-Rodriguez filed a timely appeal from the March 29, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 27, 2011. Mr. Amaya-Rodriguez participated. John Carreras, human resources manager, represented the employer. Spanish-English interpreter Ike Rocha assisted with the hearing. Exhibits One, Two, and Three were received into evidence.

ISSUE:

Whether Mr. Amaya-Rodriguez 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: Canuto Amaya-Rodriguez was employed by Tyson Fresh Meats as a full-time production worker from 1999 until March 2, 2011, when John Carreras, human resources manager, discharged him from the employment in connection with a positive breath alcohol test. Mr. Amaya-Rodriguez's regular work hours were 6:00 a.m. to 2:30 p.m. At the start of the workday on February 28, 2011, Mr. Amaya-Rodriguez went to the employer's health services department to obtain cold medicine from the nurse. The nurse smelled alcohol on Mr. Amaya-Rodriguez's breath and referred him to Mr. Carreras. Mr. Carreras noted the smell of alcohol on Mr. Amaya-Rodriguez's breath and that Mr. Amaya-Rodriguez had bloodshot eyes. Mr. Carreras asked Mr. Amaya-Rodriguez whether he had been drinking. Mr. Amaya-Rodriguez said he had consumed three or four drinks the previous evening and had stopped drinking at 11:00 p.m. Based on the odor of alcohol, the bloodshot eyes, and the admission to having recently consumed alcohol, Mr. Carreras asked Mr. Amaya-Rodriguez to submit to a breath alcohol test. Mr. Amaya-Rodriguez agreed to submit. Mr. Carreras directed Mr. Amaya-Rodriguez back to health services and a nurse gave him a breath alcohol test. The test result was .042 grams of alcohol per 210 liters of breath. Based on the positive breath test, Mr. Carreras suspended Mr. Amaya-Rodriguez indefinitely. On March 2, 2011, the employer summoned Mr. Amaya-Rodriguez to the workplace and discharged him for a second violation of the employer's drug and alcohol policy.

Mr. Amaya-Rodriguez had submitted to a breath alcohol test on June 17, 2009. The test result in that instance was .203 grams of alcohol per 210 liters of breath. The employer does not recall the basis for the test in that instance. Under the employer's drug and alcohol policy, Mr. Carreras had given Mr. Amaya-Rodriguez the choice of professional rehabilitation, discharge from the employment, or so-called self-rehabilitation. Mr. Amaya-Rodriguez chose the self-rehabilitation option and was back to work on June 19, 2009 after providing a negative breath alcohol test on that day. In connection with the June 2009 incident, Mr. Carreras advised Mr. Amaya-Rodriguez that he would be discharged from the employment if the employer found he had violated the drug and alcohol policy a second time.

The employer has a written drug and alcohol policy that is conspicuously posted in the workplace and that the employer reviews with employees annually. The employer posted the policy in English and in Spanish. Mr. Amaya-Rodriguez was aware of the policy. The policy provides for reasonable suspicion drug and alcohol testing. The policy provides that: "A violation of any of Tyson Foods, Inc., Drug and Alcohol Abuse Policy may result in severe disciplinary action, up to and including discharge." The policy prohibits employees from being under the influence of alcohol or drugs in the workplace. The policy indicates that a first offender will be given the option of termination of employment, professional rehabilitation at the employee's expense, or "Self Rehabilitation." Under the Self Rehabilitation option, the employee is to be suspended for a minimum of 5 days and a maximum of 30 days and then must provide a negative drug test before the employee is allowed to return to work. If the employee provides a positive test at the end of the suspension period, the policy indicates that the employee will be discharged from the employment. The policy also indicates that a further positive test will result in termination of the employment. The policy set the threshold concentration of alcohol that will be deemed a positive test as .04 but lists the measuring in Ng/Ml, nanograms per milliliter. The policy does not include requirements governing evidential breath testing devices, alcohol screening devices, and the qualifications for persons administering initial and confirmatory testing, or whether these will be consistent with regulations adopted as of January 1999 by the United States Department of Transportation governing alcohol testing required to be conducted pursuant to the federal Omnibus Transportation Employee Testing Act of 1991.

The employer witness does not know what amount of training the nurse who obtained the breath sample had in drug and/or alcohol testing, or whether the nurse's training on the topic was a single session or recurring training. Mr. Carreras receives annual training, up to two hours per session, in discerning whether a person is under the influence of drugs or alcohol.

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:
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> 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.
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> 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). 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 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 for the following reasons. The employer's written policy does not meet the requirements of Iowa code section 730.5(7)(f)(2), because it does not satisfy the requirements governing evidential breath testing devices, alcohol screening devices, and the qualifications for persons administering initial and confirmatory testing, or whether these will be consistent with regulations adopted as of January 1999 by the United States Department of Transportation governing alcohol testing required to be conducted pursuant to the federal Omnibus Transportation Employee Testing Act of 1991. The evidence fails to establish that the testing procedure was reliable. The evidence fails to establish that the person giving the breath test was sufficiently trained and qualified to give the test. The evidence fails to establish that the equipment used for the test was sufficiently reliable. Because the policy and procedure does not comply with the private sector drug and alcohol testing statute, the drug test from February 28, 2011 cannot be used as a basis for disqualifying Mr. Amaya-Rodriguez for unemployment insurance benefits.

The administrative law judge notes additional problems with the employer's case. The evidence fails to establish a lawful basis for the breath alcohol test given to Mr. Amaya-Rodriguez in June 2009. The employer provided no justification for that test. In addition, the employer did not follow its own policy in connection with that earlier test, when it allowed Mr. Amaya-Rodriguez to return to work after a day or two rather than the 5- to 30-day suspension called for under the policy. The problems outlined above concerning the policy or procedures used by the employer are only a sampling of the more obvious defects, but they are sufficient to render the drug and alcohol testing of Mr. Amaya-Rodriguez unlawful for unemployment insurance purposes.

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 paid to the claimant.

DECISION:

The Agency representative's March 29, 2011, 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw