IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

WILLIAM L SINGLETON
Claimant

EMCO ENTERPRISES LLC
Employer

APPEAL NO. 15A-UI-11556-JT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/27/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

William Singleton filed a timely appeal from the October 15, 2015, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that Mr. Singleton had been discharged on September 24, 2015 for misconduct in connection with the employment. Mr. Singleton requested an in-person hearing. After due notice was issued, an in-person hearing was held on November 5, 2015. Mr. Singleton participated personally and was represented by attorney Laura Jontz of Iowa Legal Aid. Stacey Johnson represented the employer and presented additional testimony through Brenda Pearson. Exhibits One through 9, 12, 13 and 14 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: William Singleton was employed by EMCO Enterprises, L.L.C., as a full-time production associate from 2004 until September 24, 2015, when the employed discharged him from the employment for refusing to submit to drug testing, for failing to make timely contact with an employee assistance program, and for failing to sign and return a last chance agreement in a timely manner. Mr. Williams last performed work for the employer on September 9, 2015. Mr. Williams' production duties involved assembling storm doors. Mr. Williams' normal work hours were 4:00 p.m. to 12:30 a.m., Monday through Friday. Mr. Williams' immediate supervisor was Tina Higgins, Value Stream Supervisor.

The employer has a one-page Drug and Alcohol Policy posted on a bulletin board in an employee break area. The policy states a follows:

> REMINDER: Drug and Alcohol Policy
> Anderson Corporation is committed to providing a safe, productive workplace; therefore we offer employees a drug-free and alcohol-free working environment designed to

promote and maintain a safe and healthy environment free from the adverse effect of alcohol/drug use.

WHO DOES THIS APPLY TO?
-- All employees and all job applicants who have been given a conditional job offer.

WHAT DO YOU NEED TO KNOW?
-- The company prohibits its employees from being under the influence of any illegal or any legal drug that impairs behavior or ability to work safely or creates a risk to employees own safety or safety of others.
-- Anderson does not allow drugs or alcohol at work, in a car while on business, in a company car or on company property.
--Required testing: under this policy, employees are required to submit to a drug and alcohol screening if:
>>There is reasonable suspicion;
>>Employee has entered into a drug treatment program;
>>Employee has sustained a personal injury or caused another employee to sustain a personal injury;
>>Employee was operating or helping to operate machinery, equipment, or vehicles involved in a work-related accident.
-- Prescription or over-the-counter (OTC) medications
>>If employees use any legal drugs while working or attempting to return to work following a disability that may affect the safety of themselves or others, they must obtain a determination from a physician and then notify Human Resources for accommodations, which may result in restricting the employee from working until prescription ends.
-- Refusing to submit to a drug and alcohol test or refuses [sic] to participate in any of the drug and alcohol testing process, the employee may be subject to termination. If a candidate refuses to take the test, the job offer will be withdrawn.

EMPLOYEE RESPONSIBILITY:
-- All employees are required to report to work drug-and alcohol-free and attend any required drug and alcohol policy training.

The employer reviewed the Drug and Alcohol Policy with employees on March 6, 2015 as part of a policy meeting. Mr. Singleton attended the meeting. The employer did not provide Mr. Singleton with a copy of the policy.

The employer has a longer, six-page, statement of its Drug and Alcohol Policy that the employer makes available for use by members of management. This policy was not provided to Mr. Singleton. The policy provides for reasonable suspicion drug and alcohol testing. Under that heading, the employer includes the following:

The Company may require an employee to undergo drug and/or alcohol testing if the Company has a reasonable suspicion that the employee:
1) Is under the influence of drugs or alcohol and exhibits observable behaviors suggesting impairment by drugs or alcohol.
2) Has violated the Drug and Alcohol Prohibition Policy statement above;
3) Has sustained a personal injury arising out of and in the course of his or her employment or has caused another employee to sustain such a personal injury;
4) Has caused a work-related accident; or

5) Was operating or helping to operate machinery, equipment or vehicles involved in a work related accident.

The longer policy statement indicates that, "Violation of this Policy may result in discipline, up to and including discharge."

The longer policy statement addresses refusal to submit to drug testing as follows:

> Employees have the right to refuse to undergo drug and/or alcohol testing. An employee who refuses to be tested, refuses to sign an Acknowledgement and Pretest Notice form, refuses to sign the Last Chance Agreement form, or whose behavior prevents meaningful completion of drug and/or alcohol testing, will be subject to termination.

The employer interprets the "subject to termination" text to be consistent with other policy statements indicating that the employer will decide the appropriate discipline on a case-by-case basis.

In the event a drug test yields a positive result, the employer's longer policy statement allows employee a five-day window during which the employee may request additional testing of a split specimen at the employee's expense. The policy does not state the cost of such testing or whether the cost to the employee will be comparable to the employer's cost for the initial testing.

The longer policy statement indicates that an employee with a positive test will, on the first violation of the policy, be given an opportunity to participate in counseling and rehabilitation, but will be required to sign a Last Chance Agreement.

On August 12, 2015, Mr. Singleton was diagnosed with arthritis in his right wrist. The diagnosis was made by a physician at a Veterans Administration clinic. Mr. Singleton had gone to the VA in response to experiencing ongoing pain in his wrist. The VA physician prescribed an anti-inflammatory medication. When Mr. Singleton reported on August 13, 2015, he spoke to Ms. Higgins and the head of safety about being diagnosed with arthritis and about the anti-inflammatory medication the doctor had prescribed to address pain in his wrist. Mr. Singleton showed Ms. Higgins and/or the head of safety the anti-inflammatory medication, including the marking on the bottle that indicated the medication could make him drowsy. Mr. Singleton continued to perform his assigned duties, which usually involved assembling parts on a framing table. Mr. Singleton's duties also involved filling in in other areas. When he did that, the work sometimes involved operating a machine punch. Other occasion work involved drilling holes, fastening screws, and hammering with a rubber mallet. After Mr. Singleton began taking the anti-inflammatory medication, he noted that his wrist began to feel better and that he was able to perform his regular framing duties with less discomfort. Up to that point, Mr. Singleton had reported no work-related injury to the employer.

At the beginning of September, Ms. Higgins wanted to send Mr. Singleton to perform drilling and hammering work duties. Mr. Singleton was concerned that such duties would aggravate his arthritic wrist and asked to continue performing the framing duties or for an alternative assignment that would not stress his right wrist. Mr. Singleton's request not to be assigned the drilling and hammering duties prompted Ms. Higgins to refer Mr. Singleton to Site Safety Specialist Eric McAtee for a discussion regarding assessment of and documentation of Mr. Singleton's need for workplace accommodations.

On September 3, 2015, Mr. McAtee told Mr. Singleton that he had scheduled a medical appointment for Mr. Singleton at Unity Point Occupational Health so that Mr. Singleton's wrist

could be evaluated. From Mr. Singleton's perspective, there was no further need for evaluation in light of the VA doctor's diagnosis of arthritis. Mr. Singleton nonetheless went along with the employer's request that he participate in the evaluation at Unity Point. The employer set the appointment for the afternoon on September 9, prior to the start of Mr. Singleton's shift. The employer made arrangements for cab transportation to the appointment and back to the workplace. On the afternoon of September 9, Mr. Singleton appeared at the workplace, collected the cab vouchers, and went to the appointment at Unity Point Occupational Health. When Mr. Singleton arrived at the medical clinic, the medical clinic staff told Mr. Singleton that the first thing he would have to do is provide a urine specimen for drug testing. Mr. Singleton was taken aback by the request. The employer had said nothing in the lead up to the appointment to indicate that Mr. Singleton would have to submit to drug testing as a condition of receiving evaluation of his wrist or in connection with such evaluation. Mr. Singleton protested to the Unity Point staff that he had been sent to the medical clinic for evaluation of his wrist, not for drug testing or suspicion of drug use. Neither Mr. Singleton nor the medical clinic staff thought to contact Mr. McAtee or anyone else at EMCO to bring them into the discussion.

Based on Mr. Singleton's refusal to submit to drug testing, the appointment was limited to evaluating Mr. Singleton's wrist. After the appointment, Mr. Singleton returned to work and to his usual duties. The medical clinic office manager left a voice mail message for Brenda Pearson, EMCO Human Resources Manager, asking Ms. Pearson to return the call to discuss Mr. Singleton's drug screen. When Ms. Pearson returned the call, the medical clinic staff stated that Mr. Singleton had refused the drug test.

During Mr. Singleton's shift on September 9, Stacey Johnson, Human Resources Generalist, met with Mr. Singleton to discuss his refusal to submit to the drug test. A union representative was present for the meeting. During the meeting, Mr. Singleton stated that he did not understand why he had to take a drug test. Ms. Johnson referenced the employer's drug and alcohol policy. Mr. Singleton asserted that the employer was discriminating against him because he is black. Ms. Johnson told Mr. Singleton that the procedure was the same for all employees who request a "worker's compensation appointment." Ms. Johnson referenced the March 6 training session that Mr. Singleton had attended and the policy posted on the bulletin board. Ms. Johnson suspended Mr. Singleton from the employment.

Later that day, the employer decided to treat the test refusal as a positive test and to place Mr. Singleton on a last chance agreement with the requirement that he contact the employee assistance program to arrange for an evaluation. At 2:00 p.m. on September 10, Ms. Johnson telephoned Mr. Singleton. A union representative was present at Ms. Johnson's end of the call. Ms. Johnson read a disciplinary letter and the last chance agreement to Mr. Singleton. Ms. Johnson told Mr. Singleton that he had the end of the day on Friday, September 11, 2015 to contact the employee assistance program. Ms. Johnson provided Mr. Singleton with the number for the employee assistance program.

On Monday, September 14, Ms. Johnson spoke with the employer point of contact at the employee assistance program. That person was unable to confirm that Mr. Singleton had contacted the program.

On Tuesday, September 15, Ms. Johnson telephoned Mr. Singleton. A union representative was against present at Ms. Johnson's end of the call. During the call, Mr. Singleton advised that he had contacted the employee assistance program on Monday. Ms. Johnson told Mr. Singleton that the deadline for contacting the employee assistance program had been Friday, September 11.

The employer had provided Mr. Singleton with a September 18, 2015 deadline for signing and returning the last chance agreement. Though the employer had mailed the materials to Mr. Singleton, Mr. Singleton had not yet received the materials by September 24, 2015, when the employer notified him he was discharged from the employment.

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). 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 and protocol under which a private sector employer doing business in Iowa may conduct drug or alcohol testing of employees. The Supreme Court of Iowa has held that an illegal drug test, one not authorized by Iowa Code 730.5, cannot provide a basis for disqualifying a claimant for unemployment insurance benefits. See Eaton v Employment Appeal Board, 602 N.W.2d 553 (Iowa 1999); see also Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003).

There are several problems with the employer's drug and alcohol policy and procedure that prevent use of the refusal to submit to drug testing as a basis for a finding of misconduct or disqualification for benefits. The employer failed to present sufficient evidence to establish that the supervisory personnel involved in making the "request" for the test had the two hours of initial training and follow up annual hour of training required by Iowa Code section 730.5(9)(h). The employer's policy failed to provide for uniform standards for actions that will be taken in case of a positive test or refusal to submit to testing, as required by Iowa Code section 730.5(9)(b). Instead, the employer reserved discretion to decide discipline on a case-by-case basis. The employer's cursory posted policy and the longer policy that was never provided to Mr. Singleton constituted insufficient notice of the written policy. See Iowa Code section 730.5(9). The policy deviated from the statutory requirement regarding notice of a positive test and right to confirmatory testing. See Iowa Code section 730.5(7)(i). There was no reasonable suspicion basis for the testing, as required by Iowa Code section 730.5(1)(h). There was no suspicion of drug or alcohol use. There was no accident or OSHA reportable injury. Rather, Mr. Singleton had recovered from a chronic medical condition and merely requested minor, reasonable accommodation to avoid causing new harm to that condition. Mr. Singleton was understandably taken aback by the request that submit to drug testing on September 9 and did not act unreasonably in refusing to submit to a drug test under the circumstances.

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

In light of the deficient drug testing policy and procedure, Mr. Singleton's response to subsequent directives that derived from the deficient policy and procedure would not provide a basis for a finding of misconduct. The evidence establishes that Mr. Singleton contacted the EAP on the Monday following the Friday deadline. That minor delay and isolated incident did not constitute insubordination or misconduct. The evidence establishes that Mr. Singleton could

not return the document the employer wanted him to sign by the deadline set by the employer because he had not received the document.

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

DECISION:

The October 15, 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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