IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

FREDDIE E GARDNER
Claimant

LOPAREX LLC
Employer

APPEAL NO. 12A-UI-13126-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/30/12
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Freddie Gardner filed a timely appeal from the October 28, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on December 4, 2012. Mr. Gardner participated. Stacey Spillman, Human Resources Manager, represented the employer.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits. The administrative law judge concludes that Mr. Gardner was discharged for no disqualifying reason.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Freddie Gardner was employed by Loparex, L.L.C., as a full-time machine operator from June 2011 until September 20, 2012, when Stacey Spillman, Human Resources Manager, discharged him from the employment for alleged violation of the employer's drug testing policy. Mr. Gardner's work hours were 7:00 p.m. to 7:00 a.m.

At 6:45 a.m. on September 20, 2012, Morning Shift Coordinator Tom Baughman announced over the loud speaker that Mr. Gardner was to report to the coordinator's office. When Mr. Gardner arrived at the coordinator's office, Mr. Baughman told Mr. Gardner that he had been selected for random drug testing. Mr. Baughman provided Mr. Gardner with a document to have the testing facility staff sign when he was finished when at the testing facility. The employer utilizes a third-party computer-based selection process for selecting employees from the selection pool for random drug testing. At the time Mr. Baughman told Mr. Gardner he had been selected for random drug testing, Mr. Gardner told Mr. Baughman that he usually needed to take his nieces to school in the morning, but was not going to take them that day and would go straight to the drug testing facility. The drug testing was to occur at a Mercy Occupational Health Clinic in Coralville. Mr. Gardner worked on the south end of Iowa City. The Occupational Health Clinic was nine miles away. Mr. Gardner had to find his own ride to the clinic.

Mr. Gardner contacted his sister and she allowed him to use her car to travel to the drug testing facility. Mr. Gardner arrived at Mercy Occupational Health between 8:10 and 8:15 a.m. At about 9:15 a.m., Mr. Gardner provided a urine specimen for drug testing. The specimen tested negative for drugs, but the clinic staff rejected the specimen as being too warm. The specimen temperature exceeded 100 degrees. Mr. Gardner offered his recent testing for sexually transmitted disease and his associated "feeling under the weather" as a possible reason for the overly warm urine specimen. The clinic staff told Mr. Gardner that he would need to provide a second urine specimen for testing, since the first was rejected as being outside the acceptable temperature range. The clinic staff gave Mr. Gardner four small cups of water at 15-minute intervals. After one and a half hours, Mr. Gardner was still unable to provide a second urine specimen for testing. At about 10:45 a.m., Mr. Gardner indicated that he needed to collect his nieces from preschool. Preschool hours were 8:25 to 11:00 a.m. If the children were collected late from preschool, they would not be allowed to attend the next day. Mr. Gardner's sister was at that point at work and he was the only person available to collect the children from preschool. The clinic nurse manager contacted Ms. Spillman, who communicated through the nurse manager that if Mr. Gardner left without providing a second specimen for testing, he would be discharged from the employment. Mr. Gardner elected to leave the testing site prior to providing a second specimen for testing. Mr. Gardner did not make further contact with the employer. On September 22, 2012, the employer mailed Mr. Gardner a letter discharging him from the employment.

The employer has a written drug testing policy. The policy provides for random drug testing. The employer provides supervisors with an hour of annual training related to the policy. Ms. Spillman does not know how long the supervisors' initial training related to the policy is. Under the policy, an employee is subject to discharge from the employment if he refuses to provide a specimen for testing without two hours of the request that he submit to drug testing. Under the policy, submission of an adulterated, substituted or otherwise tampered with specimen was considered a refusal to submit to drug testing. Mr. Gardner was aware of the policy and had received a copy of the policy.

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). 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 weight of the evidence in the record fails to establish misconduct in connection with the employment. The evidence indicates that the employer directed Mr. Gardner, prior to the 7:00 a.m., to appear for a drug test nine miles away. The employer did not provide Mr. Gardner with transportation, but instead required that he find his own way to the test. Mr. Gardner located a ride, but was not able to get to the testing facility until shortly after 8:00 a.m. Once there, Mr. Gardner waited an hour before he was given the opportunity to provide a urine specimen for testing. Mr. Gardner provided a specimen at about 9:15 a.m. The specimen was rejected because it was deemed too warm. There is no evidence to indicate that Mr. Gardner adulterated, substituted or otherwise tampered with the original specimen he provided to the

Mercy Occupational Clinic staff. After the initial specimen was rejected, Mr. Gardner remained at the collection site for another hour and a half, but was unable to provide a second specimen for testing. The employer has presented no evidence to suggest Mr. Gardner made anything other than good faith effort to provide a second specimen for testing. By the time Mr. Gardner departed at 10:45 a.m., Mr. Gardner had been at the collection site for two and a half hours. Mr. Gardner had a legitimate reason to leave at that point. The evidence fails to establish a refusal to submit to drug testing. While it was within the employer's discretion to end the employment, the evidence does not establish misconduct in connection with the employment such as would disqualify Mr. Gardner for unemployment insurance benefits. Mr. Gardner was discharged for no disqualifying reason. Accordingly, Mr. Gardner is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Gardner.

DECISION:

The Agency representative's October 28, 2012, 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/css