

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TAMARA L HOWE**  
Claimant

**APPEAL NO. 10A-UI-07643-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**KEOKUK AREA HOSPITAL**  
Employer

**OC: 04/25/10**  
**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 May 20, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was started on July 15, 2010 and completed on July 16, 2010. Claimant Tamara Howe participated. Rhonda Schreck, Human Resources Director, represented the employer and presented additional testimony through Sue Panky, Chief Nursing Executive, and Marcelle Gnann, Chemical Supervisor. Exhibits One through Six 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: Tamara Howe was employed by Keokuk Area Hospital as a full-time Registered Nurse from 2001 until April 26, 2010, when Rhonda Schreck, Human Resources Director, and Sue Panky, Chief Nursing Executive, discharged her from the employment. The employer is a private non-profit entity.

On April 26, 2010, Ms. Schreck and Ms. Panky requested that Ms. Howe submit to a reasonable suspicion drug test. Ms. Schreck has completed the drug testing training required by Iowa Code section 730.5 before an employer can engage in drug testing of employees. Ms. Schreck and Ms. Panky suspected that Ms. Howe was engaging in an unauthorized diversion of medications from the employer's omniceil automated drug dispensing system and that she was personally using the medications. This suspicion was based on the employer's review of a dispensing practices report, dated April 21, 2010, that showed Ms. Howe's rate of dispensing narcotic medications to be significantly higher than that of other nurses. The report indicated that Ms. Howe had not followed the established protocol for "wasting" narcotics on 21 instances including doses of morphine on January 31 and February 15, 2010; had deviated from a physician's order by dispensing two additional doses of morphine on February 20; had deviated from a physician's order by dispensing an additional dose of Demerol on March 15, 2010; and

had dispensed two doses of Demerol on April 4, 2010 without a physician's order. The employer had not issued any prior reprimands to Ms. Howe for medication dispensing or documentation issues. The employer had received no reports from patients or others to indicate that Ms. Howe was neglecting patients in her care.

The employer's decision to request a drug test on April 26, 2010 was not based on any behavior on the part of Ms. Howe on that date. The employer had not observed anything on that date to indicate that Ms. Howe was under the influence of a controlled substance.

After initially indicating she would not submit to testing, Ms. Howe ultimately agreed to submit to the requested drug test. Ms. Howe asked what substances would be tested and Ms. Schreck told her there was a list of substances. Enroute to the lab where she was to give a urine specimen, Ms. Howe mentioned that she was an occasional marijuana user outside work. Ms. Howe provided a urine specimen at the lab. The sample was collected by Marcell Gnann, Chemical Supervisor, and was collected as a split sample. During collection of the urine specimen, Ms. Howe told Ms. Gnann that she occasionally used marijuana outside work. After Ms. Howe provided the urine specimen, Ms. Schreck escorted Ms. Howe to the time clock and sent Ms. Howe home.

After Ms. Schreck sent Ms. Howe home, Ms. Schreck learned from Ms. Gnann about Ms. Howe's statement that she was an occasional marijuana user. Ms. Schreck consulted with legal counsel. Ms. Schreck decided to terminate the drug test and decided to terminate Ms. Howe based on the admission to occasional drug use.

On April 28, Ms. Schreck and Ms. Panky summoned Ms. Howe to the workplace and discharged her from the employment. Ms. Schreck gave Ms. Howe the option of having the urine specimen tested. Ms. Howe initially declined, but told the employer on April 29, after the discharge, that she wanted the specimen tested. Mr. Schreck declined to perform the drug test unless Ms. Howe submitted the request in writing.

Unbeknownst to Ms. Schreck, Ms. Gnann had conducted an initial screening test on a portion of the specimen Ms. Howe provided. The specimen tested "presumptive positive" for THC and amphetamine. Confirmatory testing of the specimen was precluded by Ms. Schreck's decision not to test the specimen. Ms. Howe was taking an amphetamine prescribed for her.

The employer has a written drug and alcohol testing policy that was provided to Ms. Howe during the course of the employment. The policy lists the substances to be tested and includes cannabinoids. The written policy provides for reasonable suspicion testing. The policy indicates that a positive drug test would subject the employee to discharge 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.

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 establishes that the employer did not have a sufficient basis on April 26, 2010 to request that Ms. Howe submit to a drug test. The request was not based on anything the employer observed that day. With regard to the medication dispensing or wasting irregularities, the evidence indicates that the test request occurred a few days after the employer finished reviewing the dispensing practices report and 22 days after the most recent irregularity reflected in that report. In addition, the dispensing/wasting issues did not provide sufficient evidence for the employer to conclude that Ms. Howe was diverting the narcotics for personal use. The employer had no evidence whatsoever to indicate any personal use by Ms. Howe of the narcotics dispensed by the automated dispensing system. The employer lacked the requisite reasonable suspicion to request the drug test. Accordingly, the test request was not authorized by law. Neither the test request nor information obtained in connection with the test request can serve as the basis for disqualifying Ms. Howe for unemployment insurance benefits. But for the illegal test request, Ms. Howe would have made no admissions to the employer regarding her off-duty drug use.

The weight of the evidence indicates that the employer did not follow its own drug testing policy and, accordingly, cannot invoke the policy as the basis for disqualifying Ms. Howe for unemployment insurance benefits. Outside the parameters of the drug testing policy, the employer lacked a specific work rule that subjected Ms. Howe to workplace discipline for off-duty conduct. In the absence of a work rule to provide Ms. Howe with reasonable notice that her off-duty conduct would subject her to workplace discipline, the off-duty conduct cannot serve as the basis for a finding of misconduct in connection with the employment and disqualification for unemployment insurance benefits. See Kleidosty v. EAB, 482 N.W.2d 416, 418 (Iowa 1992). Ultimately, the employer's decision to discharge Ms. Howe based on the admission to off-duty marijuana use represents an attempted end-run around the requirements of the drug testing statute and cannot stand. In the absence of a positive drug test authorized by Iowa Code section 730.5, the administrative law judge concludes that Ms. Howe was discharged for no disqualifying reason. Accordingly, Ms. Howe is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Howe.

**DECISION:**

The Agency representative's May 20, 2010, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she 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/pjs