

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRIAN G MCCLAREN
Claimant

APPEAL NO. 12A-UI-09162-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EXEL INC
Employer

**OC: 07/01/12
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the July 26, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 22, 2012. The claimant participated. Brian Smith represented the employer.

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: Brian McClaren was employed by Exel, Inc., from 1996 until June 29, 2012, when the employer discharged him for allegedly threatening Operations Supervisor Luis Salinas and Accounts Payable representative Mike Patterson, and for allegedly attempting to assault Mr. Patterson, while being transported to and from a drug test. The discharge was also based on the drug test result.

The incident that triggered the discharge occurred on June 28. Prior to his shift, Mr. McClaren had taken two prescription pain medications that had been prescribed for him by two different doctors. At some point prior to the start of the shift, Mr. McLaren had also consumed alcoholic beverages. The employer has a written drug testing policy, but did not have a copy of the policy available for the hearing and had not submitted a copy of the policy for the hearing. The employer does not know whether the specimen tested was collected as a split sample. The employer provided Mr. McClaren with a copy of the drug test result at the hospital. The employer did not mail a copy of the drug test result to Mr. McClaren or mail him a letter setting forth his right to additional drug testing of the collected specimen.

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 notice requirements for the drug test, the test could not serve as a basis for disqualifying a claimant for benefits.

The employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to establish misconduct in connection with the employment. The ruling in this matter might have been different if the employer had followed the instructions on the hearing notice and presented more direct and satisfactory evidence.

With regard to the allegations that Mr. McClaren threatened Mr. Salinas or Mr. Patterson, and the allegations that Mr. McClaren attempted to assault Mr. Patterson, the employer failed to present testimony from persons with personal knowledge concerning the conduct in question. The employer had the ability to present more direct and satisfactory evidence concerning those allegations. Mr. McClaren asserts he does not recall the incident in question. Thus, there was no testimony from anyone with personal knowledge of the alleged threats or alleged assaults.

The administrative law judge must conclude, based on the following factors, that the drug test was an illegal test and cannot be used as the basis for a finding of misconduct in connection with the employment. The employer has failed to present sufficient evidence to establish that its drug testing policy complied with requirements of Iowa Code section 730.5. The employer has failed to present sufficient evidence to demonstrate that the drug testing procedures, from the request for the test onward, complied with Iowa Code section 730.5. The employer has failed to present sufficient evidence of the drug test result itself. The evidence indicates that the employer did not comply with the notice requirements of Iowa Code section 730.5, which requires written notice mailed to the claimant by certified mail advising him of the drug test result and of his right to further testing of the collected specimen.

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

DECISION:

The Agency representative's July 26, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs