

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DARREK J GRAAP
Claimant

APPEAL NO. 13A-UI-14051-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

RIVERSIDE CASINO AND GOLF RESORT
Employer

**OC: 11/24/13
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Darrek Graap filed a timely appeal from the December 13, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on January 15, 2014. Mr. Graap participated. Bobbi Adamson represented the employer. Exhibits One through Five 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: Darrek Graap was employed by Riverside Casino and Golf Resort as a full-time Beverage Supervisor until November 20, 2013, when the employer discharged him based on a positive random drug test. The employer utilizes a third-party to select employees for random drug testing via a computer and number based system. On November 15, 2013, the employer requested that Mr. Graap provide two saliva specimens for drug testing. Mr. Graap complied. Mr. Graap was subsequently contacted by a representative of a drug testing lab. That person told Mr. Graap that the saliva specimen had tested positive for THC. The person who contacted Mr. Graap did not identify himself or herself as a doctor or medical review officer. The lab subsequently notified the employer of the positive drug test. The employer notified Mr. Graap that he was discharged from the employment. The employer has a written policy that calls for discharge from the employment in the event of a positive drug test. The policy includes THC as one of the drugs for which the test will screen. The policy lists that bodily specimens that may be collected for use in the drug testing: urine, saliva, skin, or hair. Mr. Graap received a copy of the policy. After the employer received the positive drug test result, the employer sent Mr. Graap written notice, by certified mail return receipt requested, of his right to have the other saliva sample tested by the same lab or the lab of his choice. The employer advised Mr. Graap in the document that his cost if he used the same lab would be \$10.00 but that the additional testing would otherwise be at a lab of his choice at his expense. The employer advised Mr. Graap that the same medical review officer would review the second test result.

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) alone. 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 establishes that the discharge was based on drug testing not authorized by the statute. The specimen tested was a saliva specimen. The governing statute authorizes only tests of urine, blood or breath alcohol. Because the drug testing was not authorized by the statute, the drug test result cannot be used as a basis for disqualifying Mr. Graap for unemployment insurance benefits. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Graap was discharged for no disqualifying reason. Accordingly, Mr. Graap is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The agency representative's December 13, 2013, 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