IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DEBORAH L FERGUSON
Claimant

EXIDE TECHNOLOGIES
Employer

APPEAL NO. 16A-UI-12640-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/30/16
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Deborah Ferguson filed a timely appeal from the November 18, 2016, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on an agency conclusion that Ms. Ferguson was discharged on November 2, 2016 for misconduct in connection with the employment. After due notice was issued, a hearing was held on December 14, 2016. Ms. Ferguson participated. Fred Gilbert represented the employer and presented testimony through Brenda Saunders. Exhibits 1, 2 and 5 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: Deborah Ferguson was employed by Exide Technologies as a full-time Wet Formation Operator from 2012 until November 3, 2016, when Fred Gilbert, Human Resources Manager, discharged her from the employment for refusing to submit to drug testing on November 2, 2016. Ms. Ferguson's usual work hours were 10:00 p.m. to 6:00 a.m., Sunday night through Saturday morning, six shifts per week.

The employer has a written drug testing policy. Ms. Ferguson signed her acknowledgment of receipt of the policy in October 2012. The policy included the follow provisions under "Reasons for Testing":

> B. Post Accident: Employees who are involved in on-the-job incidents that result in an injury or illness requiring treatment beyond first aid (recordable injury) will be tested. Testing will also be done for anyone involved in an incident that results in damage to property or equipment that can be reasonably estimated at or exceeding $1000.

> C. Reasonable Suspicion: Testing that is conducted when there is information about an employee's appearance, conduct or behavior that would cause a reasonable person with appropriate training, to believe that the employee has used or may be impaired by drugs or alcohol in violation of this policy.

The policy included the following penalty provision:

> The refusal by an employee to take a drug or alcohol test is considered equivalent to a confirmed positive test; therefore refusal subjects the employee to the same adverse employment actions up to and including termination of employment or withdrawal of the conditional job offer.

On October 17, 2016, Ms. Ferguson reported to her supervisor that her arms were bothering her. Ms. Ferguson had not caused or been involved in a workplace accident and her arm soreness did not result from a workplace accident. The supervisor referred Ms. Ferguson to the plant nurse, Brenda Saunders, R.N. Ms. Ferguson's work duties involved what Nurse Saunders describes as "hard tedious manual work." The work involved pushing up to 120 pounds in batteries. Ms. Ferguson saw Ms. Saunders on October 17, 2016. Ms. Ferguson told Ms. Saunders that her arms were bothering her, that they were numb and hurt, and that area that were causing her problems were the inside and outside of her elbows. Ms. Saunders concluded that Ms. Ferguson's arm soreness was the result of overuse associated with four years of performing physically demanding work. Ms. Saunders decided to have Ms. Ferguson participate in in-house therapy of the nature of physical or occupational therapy. Ms. Ferguson participated in three such sessions on October 18, October 25 and November 1. The three sessions involved arm massages that felt good, but that did not resolve the underlying soreness. From the time that Ms. Ferguson reported her arm soreness to Ms. Saunders, the employer also assigned Ms. Ferguson to less physically demanding work that would give her arms some rest from her usual physically demanding duties.

After the third in-house massage session did not resolve Ms. Ferguson's arm soreness, Ms. Saunders decided that Ms. Ferguson should be evaluated by a physician. Ms. Saunders scheduled a medical appointment for Ms. Ferguson to take place at 8:00 a.m. on November 2, 2016. Ms. Ferguson got done with her shift on November 2 at 6:00 a.m. Mr. Ferguson drove herself to the medical appointment and was not compensated by the employer for either her travel expense or her time. Once Ms. Ferguson was summoned for examination, the nurse took her blood pressure and the doctor examined her arms. The doctor told Ms. Ferguson that he wanted to put her in some elbow braces. The doctor told Ms. Ferguson that the soreness in her arms was tendonitis, was akin to tennis elbow, and would continue or return as long as she continued to perform the same kind of work. The doctor prescribed a medication. The doctor spoke to Ms. Ferguson about possibly referring her for therapy, but did not refer her for therapy.

Once the doctor had finished the exam, the doctor left and the nurse re-entered the room. Up to that point, Ms. Ferguson believed the appointment was done and that the nurse would be sending her on her way. Instead, Ms. Ferguson was surprised when the nurse told her that she could not leave without submitting to drug and alcohol testing. Ms. Ferguson protested that she was not there because she was injured, had only wanted to find out what was going on with her arms, and declined to participate in the testing. Ms. Ferguson then exited the exam room and went to the front of the clinic. Ms. Ferguson and the nurse, Stacy Pillak, R.N., each separately telephoned Ms. Saunders. Ms. Pillak reported to Ms. Saunders that Ms. Ferguson had agreed to breath alcohol testing, but had refused to submit to drug testing. Ms. Pillak asked whether it was okay for Ms. Ferguson to just participate in the alcohol testing.

When Ms. Ferguson spoke to Ms. Saunders, she asked why she would have to submit to drug and alcohol testing in connection with the appointment when she had just participated in testing a month earlier. Ms. Saunders told Ms. Ferguson that the testing from a month earlier was not the same. Ms. Saunders told Ms. Ferguson that she had to submit to testing because she had been treated by a physician and been prescribed medication. Ms. Ferguson said okay and then ended the call. Though Ms. Saunders was issuing the directive that Ms. Ferguson submit to the drug testing, Ms. Saunders most recently underwent training related to drug and alcohol abuse issues three years earlier.

Ms. Ferguson returned to speak with nurse Pillak and told her she was not going to submit to testing because she did not think she had to and either had been misled or had misunderstood the purpose of the medical appointment. Ms. Ferguson then drove home and went to bed.

Once Ms. Ferguson was home and asleep in bed, she was awakened by a call from Mr. Gilbert. She returned the call, but no one answered. At 6:15 p.m., Ms. Ferguson received a second call in which she was told not to appear for work that evening, but to call the workplace the next day.

On November 3, Ms. Ferguson called the workplace as directed. During the call, Mr. Gilbert told Ms. Ferguson that she was discharged for failing to submit to drug testing. The medical evaluation of Ms. Ferguson's arm soreness had been the sole basis for the request that Ms. Ferguson submit to drug testing.

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:
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> 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.
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> 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 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 a drug test request and procedure that was not authorized by Iowa Code section 730.5 and, therefore, a refusal to submit that was not misconduct in connection with the employment. There were several problems with the employer's approach. First, Ms. Saunders, the person issuing the directive for testing lacked the training required by Iowa Code section 730.5(9)(h), which requires the following:

> In order to conduct drug or alcohol testing under this section, an employer shall require supervisory personnel of the employer involved with drug or alcohol testing under this section to attend a minimum of two hours of initial training and to attend, on an annual basis thereafter, a minimum of one hour of subsequent training. The training shall include, but is not limited to, information concerning the recognition of evidence of employee alcohol and other drug abuse, the documentation and corroboration of employee alcohol and other drug abuse, and the referral of employees who abuse alcohol or other drugs to the employee assistance program or to the resource file maintained by the employer pursuant to paragraph "c", subparagraph (2).

Second, the employer's written policy did not provide for uniform standards of actions that would be taken in case of confirmed positive test or refusal to submit to testing as required by Iowa Code section 730.5(9)(b). Instead, the employer's policy language left to the employer's discretion that particular form and degree of discipline to be issued, whether that was discharge or something short of discharge.

Third, there was no reasonable suspicion basis for the request that Ms. Ferguson submit to drug or alcohol testing as required by Iowa Code section 730.5(1)(i). What the employer erroneously and repeated termed "post-accident" testing was not based on any accident. Iowa Code section 730.5(1)(i)(5) required the following:

> Evidence that an employee has caused an accident while at work which resulted in an injury to a person for which injury, if suffered by an employee, a record or report could be required under chapter 88, or resulted in damage to property, including to equipment, in an amount reasonably estimated at the time of the accident to exceed one thousand dollars.

There simply was no accident and no legally recognized basis for the purported "post-accident" drug test request.

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

DECISION:

The November 18, 2016, reference 01, decision is reversed. The claimant was discharged on November 3, 2016 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/rvs