

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DOUGLAS L AASLAND
Claimant

APPEAL NO. 08A-UI-06550-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOWA ETHANOL LLC
Employer

**OC: 06/15/08 R: 02
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Douglas Aasland filed a timely appeal from the July 9, 2008, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on July 30, 2008. Mr. Aasland participated. Technical Manager Ted West represented the employer and presented additional testimony through Administrative Assistant Susan Gardner.

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: Douglas Aasland was employed by Iowa Ethanol as the full-time operations manager from November 2004 until June 6, 2007, when Technical Manager Ted West discharged him based on a positive drug screen. The employer had a written drug testing policy that complied with the requirements of Iowa Code section 730.5. Mr. Aasland had received a copy of the policy and was familiar with the policy at all relative times.

The drug screen that prompted the discharge occurred on May 29, 2008. On that day, Administrative Assistant Susan Gardner requested that Mr. Aasland submit to a drug test as a follow up to Mr. Aasland's participation in an outpatient drug rehabilitation program. Ms. Gardner had undergone the initial training and follow-up training required by Iowa Code section 730.5. Mr. Aasland submitted to the drug test, which was conducted during his regular working hours. Healthworks in Mason City collected a urine sample and split the sample. The sample tested positive for cannabinoids. The medical review officer contacted Mr. Aasland with the test result and provided Mr. Aasland an opportunity to provide information regarding drugs he was on that might affect the test result. There were none. On June 5, 2008, Ms. Gardner received notice from the testing facility of positive drug screen and notified Mr. West of the result. On June 6, 2008, Mr. West notified Mr. Aasland that he was discharged from the employment. The employer had not sent Mr. Aasland written notice, by certified mail or

otherwise, of the test result or Mr. Aasland's right to request a second test using the other half of the split sample.

In April 10, 2007, Mr. Aasland had submitted to a drug screen in connection with a workplace accident. One of the persons involved in the accident suffered an injury that was reportable as a workers' compensation matter. The employer complied with the testing requirements of Iowa Code section 730.5. The split urine sample provided by Mr. Aasland tested positive for cannabinoids. Mr. Aasland was given an opportunity to talk to the medical review officer. The employer notified Mr. Aasland, by certified mail, of his right to a second test as required by Iowa Code section 730.5. As a result of this positive drug screen, the employer referred Mr. Aasland for evaluation and treatment. Mr. Aasland underwent and successfully completed treatment on or before June 7, 2007. The treatment program recommended that the employer continue to subject Mr. Aasland to drug testing.

At some point in 2007, Mr. Aasland provided a second positive drug screen as part of the follow up testing recommended by the treatment program. The employer complied with the testing procedure requirements of Iowa Code section 730.5. The split urine sample tested positive for cannabinoids. Mr. Aasland was given an opportunity to speak with the medical review officer. The employer did not send Mr. Aasland written notice, by certified mail or otherwise, of the test result or Mr. Aasland's right to request a second test using the other half of the split sample. Under the employer's written policy, a second positive drug screen was to result in termination of employment. Mr. West deviated from the policy because of Mr. Aasland's position and work performance. Mr. West had Mr. Aasland sign a memorandum of understanding regarding the test and the employer's expectation that there would be no further positive drug screens.

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. In Harrison, the Supreme Court ruled that the employer did not substantially comply with the notice requirements of Iowa Code section 730.5(7)(i)(1). The claimant was not informed in writing of his right to have a second confirmatory test done at his expense. He was not told that he could choose the laboratory to conduct the test or that he had seven days to make his decision. He was also given a significantly inflated price for the test.

Despite Iowa Ethanol's other efforts to comply with the private sector drug testing law, the weight of the evidence indicates that the employer failed to comply with the notice requirements of Iowa Code section 730.5(7)(i)(1) in connection with the May 29, 2008 drug screen and the second drug screen during 2007. In connection with each test, Mr. Aasland was not informed in writing of his right to have a second confirmatory test done at his expense. He was not told that he could choose the laboratory to conduct the test or that he had seven days to make his decision. Pursuant to the ruling in Harrison v. Employment Appeal Board, above, the final drug screen on May 29, 2008 drug screen and the second drug screen in 2007 were illegal drug tests and cannot serve as a basis for disqualifying Mr. Aasland for unemployment insurance benefits. In addition, the evidence indicates that the employer did not uniformly apply its drug testing policy.

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

DECISION:

The Agency representative's July 9, 2008, 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/kjw