

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROBERT J COLE
Claimant

APPEAL NO. 130-UI-02709-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BIOTEST PHARMACEUTICALS
Employer

OC: 10/21/12
Claimant: Appellant (1-R)

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

STATEMENT OF THE CASE:

This matter was before the administrative law judge upon an Employment Appeal Board remand, entered in Hearing Number 13B-UI-13994, after the employer had been denied the opportunity to participate in an earlier appeal hearing. The underlying decision to be reviewed on appeal is the November 15, 2012, reference 01, decision that denied benefits. Mr. Cole filed a timely appeal from that decision. After due notice was issued, a new appeal hearing was started on April 2, 2013 and completed on April 11, 2013. Claimant Robert Cole participated personally and was represented by Attorney William Tharp. Craig Cree of TALX represented the employer and presented testimony through Sheila Poirier and Misty Schellenberg. 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: Robert Cole was employed by Biotest Pharmaceuticals as a full-time physician substitute from 2011 until October 18, 2012, when the employer discharged him for recurrent negligence in the performance of his duties. Mr. Cole came to the employment licensed as an emergency medical technician. These credentials met or exceeded the employer's credential requirements. Mr. Cole's duties primarily concerned with screening blood plasma donors, completing appropriate paperwork, and handling any emergencies associated with adverse reactions to the plasma donation process. Mr. Cole received appropriate training to perform his duties. The employer had reviewed Mr. Cole's ability to perform the assigned duties on multiple occasions and found him to be capable of performing the duties assigned to him.

The final matters that triggered the discharge concerned five separate avoidable errors, all of which occurred on October 17, 2012. The workplace had not been busy that day. Instead, because the physician assistant area was not busy, the employer had asked Mr. Cole and others to assist with reception when not needed to perform donor screening. The first error

concerned a discrepancy between the number of tattoos a donor had listed on a prescreening questionnaire and the number of tattoos Mr. Cole had referenced on tattoo and body piercing paperwork he had completed. The number and timing of tattoos was important because it could impact on whether and when the donor would be allowed to donate plasma. A quality assurance employee caught the discrepancy. The employer directed Mr. Cole to have the donor correct her prescreening questionnaire, but Mr. Cole failed to do that. The second error concerned Mr. Cole not completing the deferral section of a donor's prescreening questionnaire. The deferral section addressed whether there was some health basis for barring the donor from donating for a particular period. Another employee caught the omission at the end of the day and was able to discern and appropriately document the deferral section information. The third error concerned Mr. Cole's failure to follow up on information indicating that a donor may have donated plasma at a time when she was not supposed to due to a recent body piercing. The fourth error concerned Mr. Cole's failure to follow up on information a donor provided in a prescreening questionnaire that suggested the donor had a medical procedure within the prior year that would bar the donor permanently from donating plasma. The fifth error concerned Mr. Cole failing to enter the proper donor deferral period in response information the donor provided about getting a tattoo. The tattoo would bar the donor from donating plasma for a year. Mr. Cole instead documented a shorter deferral period that applied to a failed vein check.

The final errors on October 17, 2012, followed a pattern of prior similar avoidable errors and reprimands. The employer had subjected Mr. Cole to retraining. The employer was able to again confirm that Mr. Cole had the ability to perform his duties. The employer consistently told Mr. Cole that he needed to slow down and pay appropriate attention. Mr. Cole had the ability to follow these directives.

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).

The employer has presented sufficient evidence to establish a pattern of carelessness and negligence that indicated a willful disregard of the employer's interests. Mr. Cole knew that the nature of his work required meticulous attention to detail. Mr. Cole demonstrated the ability to perform his assigned duties in a satisfactory manner, but often made avoidable errors due to haste or inattention. Most, if not all, of Mr. Cole's avoidable errors involved defective medical documentation that placed the integrity of the employer's medical recordkeeping system at risk. Mr. Cole's actions had the potential to place donors and plasma donation recipients at risk. The fact that the employer had additional safeguards in place to catch Mr. Cole's errors in no way mitigated Mr. Cole's failure to take appropriate care in performing his duties.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Cole was discharged for misconduct. Accordingly, Mr. Cole is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Cole.

Because Mr. Cole received unemployment insurance benefits in connection with the claim, this matter will be remanded to the Claims Division for entry of an appropriate overpayment decision.

DECISION:

The Agency representative's November 15, 2012, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css