IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

RENEE A DUGAN
Claimant

GOODRICH CORPORATION
Employer

APPEAL NO. 07A-UI-09889-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/23/07 R: 02
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Renee Dugan filed a timely appeal from the October 22, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on November 7, 2007. Ms. Dugan participated. Kelly Tackett of TALX UC eXpress represented the employer and presented testimony through Katie Henderson, Human Resources Administrator. The hearing in this matter was consolidated with the hearing in Appeal Number 07A-UI-09890-JTT, concerning the claimant and employer Delavan, Inc. Delevan, Inc. (employer account number 301109) and Goodrich Corporation (employer account number 306628) are the same business entity.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Renee Dugan was employed by Goodrich Corporation as a full-time shipping/receiving clerk from June 19, 2006 until September 24, 2007, when Stacy Johnson, Human Resources Generalist, discharged her. The sole basis of the discharge was a failed random drug screen. Ms. Dugan's employment involved shipping fuel nozzles for aircraft. Ms. Dugan was on the Federal Aviation Association (F.A.A.) and Department of Transportation (D.O.T.) "roster" and was, therefore, included in the group of employees subject to random drug screens. The employer utilizes a third-party business entity, ChoicePoint, to conduct the random selection of employees for drug screening.

On September 6, 2007, Ms. Dugan's immediate supervisor, Team Coordinator Brady Paullin, notified Ms. Dugan that she had been selected for a random drug screen. Ms. Dugan went to Des Moines University and provided a urine sample that was split into two specimens. Ms. Dugan provided telephone numbers that the medical review officer could use to contact her to discuss the test result. Ms. Dugan told the person who collected the urine specimen that she was on a number of prescription medications. The first number was the direct line to

Ms. Dugan's department at work. The second number was Ms. Dugan's cell phone. Both numbers were in service at all relevant times.

On September 21, 2007, the drug testing laboratory sent an e-mail message to the employer. The person to whom the e-mail message was directed was out of town and so the employer did not review the e-mail message until September 24, 2007. The email message indicated that the medical review officer had been unable to reach Ms. Dugan to discuss the test result. Ms. Dugan had continued to report to her full-time employment after she provided the specimen and continued to be available at the department phone and/or her cell phone at all relevant times. The testing facility advised the employer that the test result was available for the employer at the testing lab's web site. The employer down loaded the lab test result on September 24. The lab report indicated a positive test result for marijuana.

On September 24, Stacy Johnson, Human Resources Generalist, and Team Coordinator Brady Paullin summoned Ms. Dugan to a meeting for the purpose of discharging her from the employment. Ms. Johnson notified Ms. Dugan that she had failed the random drug test. Ms. Dugan questioned the test result and asked why no one had contacted her to discuss the result or the medications she was taking. Ms. Johnson told Ms. Dugan that the testing facility had attempted to get a hold of her, but could not reach her. Ms. Dugan insisted that she had been available and had provided telephone numbers. Ms. Dugan denied an illicit drug use. The employer did not provide Ms. Dugan with a copy of the test result prior to discharge. Ms. Johnson did provide Ms. Dugan with the number for the testing lab so that she could inquire into having the other portion of the split sample tested. The employer did not provide a copy of the lab test report for the unemployment insurance appeal hearing.

At the time the employer requested the drug test on September 6, the employer did not discuss with Ms. Dugan the consequences to her employment if she provided a test sample that tested positive. However, Ms. Dugan was aware that a positive test result would result in her discharge from the employment.

On September 26, 2007, after the discharge, the employer mailed Ms. Dugan a letter by certified mail return receipt requested. The letter advised Ms. Dugan of her right to have the other portion of the split specimen tested at her expense. The letter indicated that if that test resulted in a negative test result, the employer would bear the cost of the test, would reinstate Ms. Dugan and would provide Ms. Dugan with back pay. Ms. Dugan received noticed from the United States Postal Service that the post office had a certified letter from the employer. Ms. Dugan assumed the mailing was a letter formally notifying her of the discharge from employment and elected not to collect the letter from the post office.

After the discharge, Ms. Dugan had inquired into having the other portion of the split sample tested and learned it would cost her $150.00. This information came from the testing facility, not the employer. The employer did not know what fee would be assessed to an employee for a second test. Ms. Dugan concluded, in light of the loss of her employment and her status as a single parent, that the test fee was too great and did not have the other portion of the split sample tested.

The employer has a written drug testing policy. On September 25, 2006, Ms. Dugan signed acknowledgment of receipt of a copy of the policy. The employer did not provide a copy of the drug testing policy for the unemployment insurance appeal hearing.

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.

The employer has failed to meet its burden of proving that Ms. Dugan was discharged for misconduct in connection with the employment that would disqualify her for unemployment insurance benefits. The employer has failed to provide sufficient and satisfactory proof that its written drug testing policy complied with the applicable state and/or federal law. The employer has failed to provide any evidence regarding the chain of custody after Ms. Dugan provided her urine specimen. In other words, there is insufficient evidence even to prove that the reported lab test result concerned the specimen provided by Ms. Dugan. The employer has failed to provide sufficient and satisfactory evidence that the test procedure itself was sound. The employer has failed to present available documentary evidence. The employer failed to prove that it complied, prior to the date of discharge, with applicable notice requirements. The greater weight of the evidence indicates that Ms. Dugan was at all relevant times prior to the discharge available to be contacted by the medical review officer. The evidence indicates that at the time the employer requested the sample on September 6, the employer did not discuss with Ms. Dugan the consequences to her employment if the sample tested positive. The evidence indicates that that discussion did not take place until 18 days after Ms. Dugan provided the sample. The evidence fails to establish a "current act" and fails to otherwise establish misconduct.

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

DECISION:

The Agency representative's October 22, 2007, reference 01, decision is reversed. The claimant was discharged 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

_____
Decision Dated and Mailed

jet/pjs