

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JULIE K JENSEN

Claimant

APPEAL NO. 13A-UI-08316-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WARREN DISTRIBUTION CO

Employer

OC: 06/23/13

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Julie Jensen filed a timely appeal from the July 12, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 20, 2013. Ms. Jensen participated. Jenny Anderson represented the employer. Exhibits One through Nine 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: Julie Jensen was employed by Warren Distribution Company as a full-time shipper from 2011 until June 20, 2013, when the employer discharged her from the employment in connection with a positive alcohol test. Ms. Jensen's work hours were 7:00 a.m. to 3:45 p.m. Ms. Jensen's immediate supervisor was Craig Bond, Shipping Supervisor.

On the morning of June 20, 2013, Mr. Bond made contact with Ms. Jensen after a staff meeting and while Ms. Jensen was performing her work. Mr. Bond told Ms. Jensen that another supervisor, Jeff Patterson, thought he smelled an odor of alcohol coming from Ms. Bond during a meeting that morning. Mr. Bond also told Ms. Jensen that her eyes were bloodshot and that she had been argumentative. Ms. Jensen wears contacts and had worn her contacts to bed. Ms. Jensen asserts her complexion is such that it is routinely red or flushed. Ms. Jensen denies that she had been argumentative. Mr. Bond requested that Ms. Jensen submit to reasonable suspicion drug and alcohol testing and Ms. Jensen agreed to do so. The employer transported Ms. Jensen to Mercy Occupational Health Clinic and Ms. Jensen provided a urine specimen and submitted to two breath alcohol tests spaced more than 15 minutes apart. The first breath alcohol test produced a result .159 grams alcohol per 210 Liters of breath. The second breath alcohol test produced a result of .150 grams alcohol per 201 Liters of breath. Based on the positive breath test, the employer notified Ms. Jensen that she was discharged from the employment.

In making the decision to discharge Ms. Jensen from the employment, the employer considered a positive breath alcohol test from June 2012, after which Ms. Jensen had participated in outpatient alcohol abuse treatment.

The employer's written drug and alcohol testing policy closely tracks Iowa Code section 730.5. The policy provided for reasonable suspicion drug testing. The policy provided for uniform discipline in the event of a second positive alcohol test. The policy called for rehabilitation after the initial positive alcohol test, provided the employee had been with the company the requisite period. The policy called for discharge of the employee upon a second positive alcohol test. The policy indicated that a breath alcohol content of .04 or above would be deemed a positive drug test. The employer's supervisory staff had undergone training on discerning whether a person was under the influence of alcohol or drugs as required by Iowa Code section 730.5.

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 central issue of this case is whether the employer had reasonable suspicion that Ms. Jensen was under the influence of alcohol. To prove that, the employer has presented only a checklist completed by Mr. Bond and witnessed by Mr. Patterson and Jason Larson. The employer elected not to provide testimony from Mr. Bond, Mr. Patterson, or anyone else with direct involvement in determining that there was reasonable suspicion or in requesting the tests. The employer has provided no testimony from persons with personal knowledge of the testing procedure to establish the accuracy of the breath alcohol test results. The employer has provided no testimony from persons with personal knowledge of the 2012 alcohol testing. Based on the lack of testimony from persons with personal knowledge, the administrative law judge concludes that the test was an illegal test and cannot be used as a basis for disqualifying Ms. Jensen for unemployment insurance benefits. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Jensen was discharged for no disqualifying reason. Accordingly, Ms. Jensen is eligible for benefits, provided she is otherwise eligible. The employer’s account may be charged for benefits paid to Ms. Jensen.

DECISION:

The agency representative's July 12, 2013, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css