

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

**COLEBANK, PATRICK, J
1001 E MAIN ST APT 3
CLARINDA IA 51632-2346**

APPEAL NO. 09A-UI-17624-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**NSK CORPORATION
%THOMAS & THORNGREN INC
PO BOX 280100
NASHVILLE TN 37228**

APPEAL RIGHTS:

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to:

***Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319***

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

The name, address and social security number of the claimant.

A reference to the decision from which the appeal is taken.

That an appeal from such decision is being made and such appeal is signed.

The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PATRICK J COLEBANK
Claimant

APPEAL NO. 09A-UI-17624-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NSK CORPORATION
Employer

OC: 11/23/08
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 9, 2009, reference 04, decision that allowed benefits. After due notice was issued, a hearing was held on January 4, 2010. Claimant Patrick Colebank did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Lynda Swanson, Human Resources Senior Administrator, represented the employer. Exhibits One through Four 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: Patrick Coleman was employed by NSK Corporation as a full-time water pump machine operator from September 2007 until October 16, 2009, when the employer discharged him from the employment based on a positive drug test. On October 12, 2009, Mr. Colebank cut his finger while operating his assigned machine. A supervisor took Mr. Colebank to Clarinda Regional Health Center for medical evaluation and to obtain a urine sample for drug testing. A urine specimen was collected as a split sample and forwarded to a lab in Lenexa, Kansas. No medical review officer contacted Mr. Colebank to solicit information that might impact on the validity of the drug test. On October 16, the lab faxed a drug screen report to the employer that indicated a positive screen for marijuana metabolite. The report indicates on its face it was certified by a Haydee O. Miranda, but does not indicate whether that person was a medical review officer. On October 16, John Poore, First Shift Supervisor and Mike Mesky, Plant Manager, spoke to Mr. Colebank about the test result and notified him that he was discharged from the employment. They told Mr. Colebank that he could take another test at his expense, but that would require a new specimen for testing.

The employer has a one-sentence written drug testing policy. Policy indicates that "the consumption during the shift or the arrival for work under the influence of alcoholic beverages or illegal drugs" could warrant immediate discharge.

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 notice requirements for the drug test, the test could not serve as a basis for disqualifying a claimant for benefits.

The evidence in the record indicates that the employer discharged Mr. Colebank based on an illegal drug test. The employer's written drug testing policy did not come anywhere close to satisfying the requirements of Iowa Code section 730.5. The drug testing procedure and certification process omitted steps required by Iowa Code section 730.5. Employer failed to provide the written notice by certified mail required by Iowa Code section 730.5.

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

DECISION:

The Agency representative's November 9, 2009, reference 04, decision is affirmed. 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/pjs