

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**COREY M BAILEY**  
Claimant

**APPEAL NO. 14A-UI-12370-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MENARD INC**  
Employer

**OC: 11/02/14**  
**Claimant: Appellant (2/R)**

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

**STATEMENT OF THE CASE:**

Corey Bailey filed a timely appeal from the November 25, 2014, reference 02, decision that disqualified him for benefits. After due notice was issued, a hearing was held on December 18, 2014. Mr. Bailey participated. Paul Hammell, Store Counsel, represented the employer and presented testimony through Dan Gerovac, Assistant General Manager, and Tracey Nelson, Human Resources Coordinator. Exhibits A through E 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: Corey Bailey was employed by Menard, Inc. as a warehouse worker from February 2014 until November 5, 2014 when the employer discharged him based on a positive drug test. On October 27, 2014 Mr. Bailey was operating a tractor/yard horse outside the employer's distribution center in Shelby when the unit he was operating rolled over. The accident resulted in approximately \$25,000 in property damage. Mr. Bailey complained of being hurt and requested medical evaluation. Travis Eckles, Assistant Yard Manager, transported Mr. Bailey to a local medical facility where Mr. Bailey was examined for injuries and where Mr. Bailey was asked to provide a urine specimen for post-accident drug testing. Aside from annual viewing of an hour-long video, Mr. Eckles had had no training in discerning whether a person was under the influence of alcohol or drugs and no training concerning drug testing. The medical facility collected Mr. Bailey's urine specimen as a split specimen and forwarded both portions of the specimen to a certified lab for drug testing.

Mr. Bailey attempted to return to work on October 29, 2014. At that time, Tracey Nelson, Human Resources Coordinator, notified Mr. Bailey that he was suspended for three days due to the property damage resulting from the rollover accident.

Mr. Bailey attempted to return to work on November 5, 2014 after he had served the three-day suspension. At that time, the employer notified Mr. Bailey that he could not yet return to work because the employer had not yet received the results of the drug test. The lab performing the drug test had not yet been able to speak to Mr. Bailey regarding the test result and, for that reason, had not yet reported the result to the employer. The employer provided Mr. Bailey with a telephone number for the lab and directed Mr. Bailey to call the lab immediately. Mr. Bailey telephoned the drug testing lab and spoke to an assistant about the drug test result. Mr. Bailey was not given the opportunity to speak directly with a medical review officer, or a doctor, regarding the drug test result. The lab representative notified Mr. Bailey that his urine specimen had tested positive for marijuana. When Mr. Bailey explained he did not know how that could be, since he had not recently smoked marijuana, the representative explained that the substance could remain in his body for about 100 days.

On November 5, 2014 after speaking with the lab representative, Mr. Bailey returned to the workplace for a meeting to discuss the positive test result. The employer told Mr. Bailey that the result was positive. The employer told Mr. Bailey that he had a right to have the second portion of the split specimen tested, that the cost would be \$150. Mr. Bailey initially misunderstood and thought he could provide a new specimen for testing. When the employer clarified that it was the second portion of the initial split specimen that would be tested, Mr. Bailey declined to that additional testing. The employer then discharged Mr. Bailey from the employment.

The employer has a written drug testing policy that the employer provided to Mr. Bailey at the start of his employment (See Exhibit E). The policy provides for post-accident drug testing. The policy states the drugs for which employees would be screened and included marijuana in the list. The policy prohibited any detectable amount of controlled substance. The policy called for the collection of split specimens for testing. The policy called for testing of the specimen by a certified lab. The policy indicated that the employee subject to testing would be given the opportunity to provide information. The employer's policy included the following notification provision:

Procedures for Team Members to Contest Test Results

If the test of a current Team Member is confirmed positive, Menards will notify the Team Member *in writing by certified mail, return receipt requested*, of the results of the test, the Team Member's right to request and obtain a confirmatory test of the second portion of the sample previously collected at an approved laboratory of his or her choice, and the fee payable by the Team Member to Menards for reimbursement of the costs associated with the second confirmatory test. ... If the Team Member, in person or by certified mail, return receipt requested, requests a second confirmatory test, identifies an approved laboratory to conduct the test, and pays the fee *within seven (7) days from the date the Company mails by certified mail, return receipt requested, the written notice to the Team Member*, a second confirmatory test must be conducted. The results of the second confirmatory test are then reported to the Medical Review Officer who reviewed the initial confirmatory test results, who will review the results and issue a report to the Company. If the results of the second test do not confirm the results of the initial confirmatory test, the Company will reimburse the Team Member for the fee paid by the Team Member for the second test and the initial positive test will be negated for purposes of disciplinary action.

[Emphasis added.]

The employer's drug testing policy containing the following provision regarding the discipline that would result from a positive drug test:

**CONSEQUENCES FOR POLICY VIOLATIONS**

Team Members who engage in any of the prohibited conduct listed above are in violation of this Policy and are subject to discipline, *up to and including termination and at Menards' sole discretion. While the discipline imposed will depend on the circumstances, and Menards reserves the right to determine, in its discretion, discipline imposed*, ordinarily certain offenses will result in immediate termination (e.g. possession, sale, or use of illegal drugs on Menard's premises or during working time).

[Emphasis added.]

**REASONING AND CONCLUSIONS OF LAW:**

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Dep't of Job Serv., 275 N.W.2d 445, 448 (Iowa 1979).

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 evidence in the record establishes a discharge that was based on an illegal drug test. The employer's written policy did not comply with the requirement that the policy set forth uniform standards for actions that would be taken in the case of a confirmed positive test. See Iowa Code Section 730.5(8)(b). Instead, the policy explicitly reserves to the employer the discretion to decide discipline on a case-by-case basis. The Menards personnel involved in the request for the drug test lacked the training required by Iowa Code Section 730.5(9)(h). Mr. Bailey was not provided with an opportunity to provide information directly to the medical review officer for his or her consideration and instead was provided only the opportunity to speak with an unspecified lab representative. This did not comply with the requirement set forth at Iowa Code Section 730.5(7)(c)(2). The employer did not comply with its own written policy. Importantly, the employer did not comply with the provision of its written policy, or the law set forth at Iowa Code Section 730.5(7)(i)(1) and (2), that required the employer to notify Mr. Bailey, *by certified mail, return receipt requested*, of the drug test result and his right to additional testing of the other portion of the split specimen. This last failure to comply with the statute was sufficient, by itself, to render the drug test an illegal drug test under the statute and prior Supreme Court decisions.

Because the discharge was based on an illegal drug test, the discharge cannot serve as a basis for disqualifying Mr. Bailey for unemployment insurance benefits. The evidence indicates that the discharge was not based on the accident itself. Discipline for the accident had been addressed through the three-day suspension. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Bailey was discharged for no disqualifying reason. Accordingly, Mr. Bailey is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

During the hearing, Mr. Bailey asserted that he has been unable to work since he established his claim for benefits. For that reason, this matter will be remanded to the Benefits Bureau for initial determination of whether Mr. Bailey has met the work ability and availability requirement since he established his claim for benefits.

**DECISION:**

The November 25, 2014, reference 02, 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.

This matter is remanded to the Benefits Bureau for initial determination of whether the claimant has been able to work and available for work since he established his claim for benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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