

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JAMES A HOLLISTER**  
Claimant

**APPEAL NO. 07A-UI-00336-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**EAGLE WINDOW & DOOR INC**  
Employer

**OC: 01/08/06 R: 04  
Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

Eagle Window & Door filed a timely appeal from the January 2, 2007, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on January 25, 2007. Claimant did not participate. Human Resources Representative Amy Turner represented the employer. The administrative law judge took official notice of the Agency's records regarding benefits disbursed to the claimant and received Employer's Exhibits One through Five 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: James Hollister was employed by Eagle Window & Door as a full-time assembler from November 1, 2004 until November 9, 2006, when Director of Human Resources Jeff Carson discharged him based on an alleged refusal to submit to a drug test. On October 12, 2006, Mr. Hollister had reported to the employer that he felt a pull in his shoulder while loading a paint rack at work. In response, the employer prepared a workers' compensation first report of injury form and filed it with the State of Iowa. The employer next spoke with Mr. Hollister regarding his shoulder on October 27. At that point, Mr. Hollister indicated that he did not think he needed medical attention for the injury. The employer was going to rotate Mr. Hollister through work that would be easier on his shoulder. The employer next spoke with Mr. Hollister regarding the injury on November 1. At that time, Mr. Hollister indicated that he had begun to feel better, but felt a pulling sensation in his shoulder when he performed lifting. At that point, Mr. Hollister was treating the condition with Ibuprofen.

On November 6, the employer's nurse decided that Mr. Hollister should be evaluated by a medical professional. On November 7, the employer directed Mr. Hollister to appear at its medical provider to undergo a "post-accident" drug screen. Mr. Hollister appeared as directed and provided a sample. The provider's nurse deemed the quantity of urine Mr. Hollister

provided insufficient for testing and discarded the sample. The record does not indicate the quantity of urine Mr. Hollister provided. The nurse directed Mr. Hollister to stay and provide a second sample. At some point, Mr. Hollister indicated a need to leave to pick up his spouse from work. The nurse advised Ms. Hollister that if he did not stay, his conduct would be deemed a refusal to submit to a test. Mr. Hollister insisted that he needed to collect his spouse from work. The nurse contacted Human Resources Manager Jeff Carson, who instructed Mr. Hollister to return to the provider by 4:45 p.m. after he collected his spouse and that the clinic closed at 5:00 p.m. The employer's witness does not know how long Mr. Hollister had been at the medical clinic before he indicated a need to leave. The nurse waited until 5:20 p.m., but Mr. Hollister did not return. Mr. Hollister did not report for work on November 8 and did not notify the employer that he would be absent. On November 9, Mr. Hollister appeared for work and Human Resources Manager Jeff Carson discharged him from the employment. Mr. Carson is still with the employer, but did not testify.

The employer has a written drug testing policy that substantially complies with Iowa Code section 730.5. Mr. Hollister had received a copy of the policy on January 7, 2005.

### **REASONING AND CONCLUSIONS OF LAW:**

The question is whether the evidence in the record establishes that Mr. Hollister was discharged for misconduct in connection with the employment. It does not.

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). The administrative law judge notes that the employer elected to have a person without personal knowledge of the events in question testify at the hearing rather than present testimony from individuals with personal knowledge of the events in question.

The evidence in the record fails to establish that the employer conducted the drug testing pursuant to investigating an accident in the workplace that resulted in injury to a person for which injury, if suffered by an employee, a record or report could be required under Chapter 88 of the Iowa Code. See Iowa Code section 730.5(8)(f). The evidence indicates that the test request in question occurred 26 days after Mr. Hollister reported the pull in his shoulder. During that time, Mr. Hollister received no medical evaluation for the condition and received no treatment other than self-administered Ibuprofen. The employer's nurse's decision on November 7 to send Mr. Hollister for further "evaluation," after the long delay, appears an arbitrary decision. The evidence fails to indicate that Mr. Hollister received any further medical evaluation or whether such evaluation was even necessary. This alone would cause the employer's request for a drug test to fall outside the testing authorized by Iowa Code section 730.5.

The evidence indicates that Mr. Hollister did in fact provide a urine sample to the employer's medical provider. The evidence in the record fails to establish that the nurse in fact had good cause to discard the sample. The evidence in the record fails to establish how long Mr. Hollister was at the employer's medical provider waiting to provide a second urine sample before he indicated a need to leave to collect his spouse. The evidence fails to provide any indication as to what investigation, if any, the employer made into Mr. Hollister's reasons for not returning to the medical clinic.

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

**DECISION:**

The Agency representative's January 2, 2007, reference 02, 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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