IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

THEODOR G GUILLIAMS
Claimant

WESTROCK SERVICES INC
Employer

APPEAL NO. 17A-UI-02628-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/12/17
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Theodor Guilliams filed a timely appeal from the March 3, 2017, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Mr. Guilliams was discharged on February 9, 2017 for violation of a known company rule. After due notice was issued, a hearing was held on March 31, 2017. Mr. Guilliams participated and presented additional testimony through Jeff Hartford. Christine Feahr represented the employer. Exhibits 1, 2 and 3 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: Theodor Guilliams was employed by Westrock Services, Inc., as a full-time press operator from 1982 until February 9, 2017, when the employer discharged him based on a positive drug test. On December 18 2016, Mr. Guilliams commenced an approved medical leave of absence. Mr. Guilliams doctor released him to return to work without restrictions effective February 2, 2017. On that day, Christine Feahr, Human Resources Manager, or Deb Hinrichsen, Human Resources Coordinator, telephoned Mr. Guilliams and told him that he would be required to submit to a return-to-work evaluation performed a doctor at Clinton Occupational Health and to provide a specimen for drug testing before he would be allowed to return to work. Neither Ms. Feahr nor Ms. Hinrichsen had participated in training in drug or alcohol testing or in discerning whether a person was under the influence of drugs or alcohol within the year that preceded the request that Mr. Guilliams submit to drug testing. Mr. Guilliams' leave of absence had not been tied in any way to substance abuse issues and the employer did not have any reason to suspect that Mr. Guilliams was under the influence of drugs. Mr. Guilliams was at home when he received the call from Ms. Feahr. Mr. Guilliams had to transport himself to Clinton Occupational Health. Once there, Mr. Guilliams submitted to the return-to-work medical evaluation and was cleared by the occupational health doctor to return to work. As part of the same trip, Mr. Guilliams provided a urine specimen for drug testing. Mr. Guilliams observed the

laboratory technician at Clinton Occupational Health split his urine specimen into two portions. Mr. Guilliams initialed the seals before the lab tech placed them on the split-specimen containers.

After Mr. Guilliams made the trip to Clinton Occupational Health, the employer required him to remain off work until the employer received the results of drug screening. The employer promptly learned that the occupational health doctor had released Mr. Guilliams to return to work in connection with the return-to-work exam.

On February 6, 2017, a medical review officer telephoned Mr. Guilliams regarding the drug test that had been positive for marijuana. The medical review officer inquired whether Mr. Guilliams had a prescription for medical marijuana. Mr. Guilliams did not. The medical review officer did inquire about whether Mr. Guilliams was taking any other substances. The medical review officer told Mr. Guilliams that he would be reporting the positive test result to the employer.

On February 6, 2107, the employer received the report indicating that the drug test was positive for marijuana. The employer contacted Mr. Guilliams on or about February 7, 2017 to notify him that he was discharged from the employment based on the positive drug test. The employer had Mr. Guilliams report to the workplace on February 9, 2017 to sign discharge documentation.

The employer did not mail to Mr. Guilliams, by certified mail or otherwise, a copy of the drug test report or formal notice regarding his right to have the second portion of the split specimen tested at a lab of his choosing and a cost comparable to the employer's cost for the initial test.

The employer had a written substance abuse policy. The policy that was provided to Mr. Guilliams and posted in the plant provided for pre-employment drug testing, reasonable suspicion drug testing, and random drug testing. Mr. Guilliams employment was governed by a collective bargaining agreement. In July 2015, the employer implemented a revised substance abuse policy that added "Layoffs or leave of absences of thirty (30) days or more" as a situation under which employees would be expected to submit to drug testing. The policy containing this provision was not included in the collective bargaining agreement, the policy provided to Mr. Guilliams, and the policy posted in the plant did not contain this additional provision for drug testing in connection with layoffs or leaves of absence. That policy that was provided to Mr. Guilliams listed the substances to be screened and that list included marijuana. The policy stated that a positive drug or alcohol test would result in immediate discharge from the employment.

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). 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 notice requirement set forth in the statute, the test could not serve as a basis for disqualifying a claimant for benefits.

The evidence in the record establishes Mr. Guilliams' discharge was based on private sector drug testing that was not authorized by and not in compliance with Iowa Code section 730.5. Accordingly, the positive drug test cannot be used as a basis for disqualifying Mr. Guilliams for unemployment insurance benefits. There was several ways in which the drug test did not comply. Neither Ms. Feahr not Ms. Hinrichsen had the supervisory personnel training required by Iowa Code section 730.5(9)(h) before a private sector employment may engage in drug testing. That Code section states as follows:

> *h.* In order to conduct drug or alcohol testing under this section, an employer shall require supervisory personnel of the employer involved with drug or alcohol testing under this section to attend a minimum of two hours of initial training and to attend, on an annual basis thereafter, a minimum of one hour of subsequent training. The training shall include, but is not limited to, information concerning the recognition of evidence of employee alcohol and other drug abuse, the documentation and corroboration of employee alcohol and other drug abuse, and the referral of employees who abuse alcohol or other drugs to the employee assistance program or to the resource file maintained by the employer pursuant to paragraph *"c"*, subparagraph (2).

The employer has not provided the policy containing the return-to-work testing requirement to Mr. Guilliams as required by Iowa Code section 730.5(9)(a)(1), which states as follows:

> *a.* (1) Drug or alcohol testing or retesting by an employer shall be carried out within the terms of a written policy which has been provided to every employee subject to testing, and is available for review by employees and prospective employees.

The return-to-work drug testing was not included in the circumstances in which Iowa Code section 730.5(1) authorized private sector drug testing. This was not a pre-employment drug testing because Mr. Guilliams was already employed by the company and had not separated from the company. This was not a reasonable suspicion, post-accident or computer-generated random drug test. The timing of the test and transportation arrangement to the test did not comply with Iowa Code section 730.5(6), which requires that the testing occur during or immediately before or after scheduled work hours and that the employer provide the transportation. The employer did not comply with the notice requirement set forth at Iowa Code section 730.5(7)(i)(1) and (2), which requires the following:

> *i.* (1) If a confirmed positive test result for drugs or alcohol for a current employee is reported to the employer by the medical review officer, the employer shall notify the employee in writing by certified mail, return receipt requested, of the results of the test, the employee's right to request and obtain a confirmatory test of the second sample collected pursuant to paragraph *"b"* at an approved laboratory of the employee's choice, and the fee payable by the employee to the employer for reimbursement of expenses concerning the test. The fee charged an employee shall be an amount that represents the costs associated with conducting the second confirmatory test, which shall be consistent with the employer's cost for conducting the initial confirmatory test on an employee's sample.

Under Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003), this last deficiency is by itself sufficient to render the drug test an illegal drug test that cannot be used to disqualify Mr. Guilliams for unemployment insurance benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Guilliams was discharged for no disqualifying reason. Accordingly,

Mr. Guilliams is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The March 3, 2017, reference 01, decision is reversed. The claimant was discharged on February 9, 2017 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/rvs