

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEANA A KEEGAN
Claimant

APPEAL NO. 15A-UI-04885-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SEARS MANUFACTURING CO
Employer

OC: 12/28/14
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Jeana Keegan filed a timely appeal from the April 14, 2015 , reference 02, decision that disqualified her for benefits and that relieved the employer of liability for benefits. After due notice was issued, a hearing was held on June 2, 2015. Ms. Keegan participated. Jerry Sander of Employers Unity represented the employer and presented testimony through Trisha Taylor.

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: Jean Keegan was employed by Sears Manufacturing Company as a full-time assembler from February 2014 until March 16, 2015, when Trisha Taylor, Human Resources Manager, discharged her from the employment in response to a positive breath alcohol test. Ms. Taylor oversees the employer's drug and alcohol testing program. Ms. Taylor underwent an initial two-hour training session in drug and alcohol related matters and underwent an hour of annual training thereafter.

At the time Ms. Keegan began her employment, the employer provided her with an employee handbook that included a drug and alcohol testing policy. The policy provided for random drug and alcohol testing. The employer's random selection process is conducted by a third party that utilizes computer software to randomly select employees for testing. The employer has two pools of employees for random testing selection purposes. Group A consists of all employees. Group B consists of employees who have previously tested positive for drugs or alcohol. The employer's alcohol testing policy establishes .04 gram/210 liters of breath as the threshold for a positive alcohol test result. The employer's policy provides that an employee who has a positive breath alcohol test will be allowed to participate in substance abuse evaluation and recommended treatment and will be subject to random drug testing in the ensuing year. The policy provides that if there a subsequent positive breath alcohol test, the employee will be discharged from the employment. The policy provides a similar provision for positive drug tests.

In August 2014, Ms. Keegan had a positive random drug test. That positive drug test moved her from the Group A pool of employees to the Group B pool of employees. In September 2014, Ms. Keegan was randomly selected from the Group B pool for drug and alcohol testing and had positive breath alcohol test. The two breath alcohol screens at that time measured .058 and .053 grams of alcohol per 210 liters of breath. Ms. Keegan underwent substance abuse evaluation and returned to work with the understanding that if she had another positive breath alcohol test she would be discharged from the employment.

On March 12, 2015, Ms. Keegan was randomly selected from the Group A pool for drug and alcohol testing. Ms. Keegan had a positive breath alcohol test. The two breath alcohol screens at that time measured .080 and .082 grams of alcohol per 210 liters of breath. The weight of the evidence indicates that all positive breath alcohol test results were valid and resulted from a valid testing procedure. Ms. Keegan asserts she had four whiskey cocktails the prior the evening and had stopped about 8:00 p.m. However, her .080 BAC 12 hours later squarely refutes that assertion and establishes that she either had substantial more to drink or drank substantially later than she admits, or both. After Ms. Keegan provided the positive breath test, the employer sent her home. The employer recalled Ms. Keegan to the workplace on March 16, 2015 for a pre-discharge proceeding and then discharged her 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) 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."

The weight of the evidence in the record establishes that the employer's drug and alcohol policy and testing protocol conformed to the requirements of Iowa Code section 730.5. Ms. Taylor had the requisite training. The employer's policy set forth the appropriate threshold breath alcohol measurement that would constitute a positive test. The employer's policy provided uniform requirements for discipline and rehabilitation. The random selection process complied with the requirement of the statute. Ms. Keegan was randomly selected for drug and alcohol testing three times, with the second random selection being related to rehabilitation. Ms. Keegan tested positive for alcohol in September 2014, underwent the required rehabilitation, and then tested positive again on March 12, 2015. Ms. Keegan's repeat alcohol violations constituted misconduct in connection with the employment. Accordingly, she is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits.

DECISION:

The April 14, 2015, reference 02, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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