IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOHN R WHITVER
Claimant

CAREER OPTIONS INC
Employer

APPEAL NO. 09A-UI-10722-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/14/09
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

John Whitver filed a timely appeal from the July 16, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 26, 2009. Mr. Whitver participated personally and was represented by attorney Ben Merril. Attorney James Van Dyke represented the employer and presented testimony through Kristen Nehring, Office Manager. Exhibits One, Four, Six, 15 through 18, 21, 22, 24, 27, 39, 44, 48, 53, 60 and 61 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: The employer has provided workers for the Famland Foods production plant in Carroll since June 30, 2008. John Whitver became a Career Options employee on June 30, 2008 and worked as a full-time maintenance mechanic. Mr. Whitver had performed the same work while an employee of another agency from January to the end of June 2009. In the course of the employment, Mr. Whitver was promoted to a lead maintenance mechanic position.

The employer discharged Mr. Whitver on April 28, 2009 based on a final incident that occurred on April 16, 2009. On April 16, 2009, Mr. Whitver failed to follow the established lock out/tag out policy before he commenced working on a production line machine. The machine activated while Mr. Whitver had his hand inside. The machine compressed Mr. Whitver's wrist and caused injury. Mr. Whitver was initially treated at the employer's first aid station, but was then transported to the emergency room. Mr. Whitver was in a great deal of pain. Mr. Whitver continued on pain medications while he was off work recovering from his injury. Mr. Whitver continued off work until April 28, 2009. On April 27, a doctor released Mr. Whitver to return to light-duty work on April 28. Rather than place Mr. Whitver in a light-duty assignment, the employer discharged Mr. Whitver from the employment.

Mr. Whitver had received appropriate safety training and was well aware of the lock out/tag out procedure. Mr. Whitver had received two prior reprimands for safety-related matters. On June 30, 2008, Mr. Whitver's fingers were pinched when he pushed a "basket" on some rollers. A supervisor had directed Mr. Whitver to move the basket. Mr. Whitver could have used a "mule," a forklift type device, but used his hands instead. The supervisor had not specified how Mr. Whitver should move the basket. The second safety-related incident occurred on January 12, 2009. Mr. Whitver rested his hand atop a machine with moving parts. A moving part on the machine brushed across his finger and broke the skin.

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).

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 weight of the evidence in the record indicates that Mr. Whitver willfully failed to follow the lock-out/tag-out procedure on April 16, 2009. Mr. Whitver was well familiar with the procedure and knew he was required to follow it before he commenced working on a machine. Mr. Whitver's tools, with his locks, was some distance away and Mr. Whitver elected not to collect his locks before he started working on the machine. Mr. Whitver knew the power was not shut off at the time he put his hand in the machine and suffered injury. Mr. Whitver was the lead maintenance mechanic and was responsible not only with following the safety rules, but also with modeling compliance for other employees under his supervisor. Mr. Whitver put himself and others at risk.

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).

The evidence in the record fails to establish a current act of misconduct. See 871 IAC 24.32(8). The evidence indicates that the employer thought it appropriate to question Mr. Whitver about the lock-out/tag-out procedure at the employer's first aid station before Mr. Whitver was transported to the emergency room on April 16. The employer thought it appropriate to further question Mr. Whitver about the lock-out/tag-out procedure while Mr. Whitver was at the emergency room and prior to Mr. Whitver being treated on April 16. Both of these interviews occurred at a time when Mr. Whitver was in a great deal of pain, but the employer conducted them nonetheless. If the employer could engage in such questioning, the employer could also have put Mr. Whitver on notice of possible consequences for the conduct. Given the employer's steps to collect information from Mr. Whitver on April 16, the employer's failure to notify Mr. Whitver until April 28 that the April 16 incident might serve as a basis for discharging him from the employment involved unreasonable delay on the part of the employer. The evidence fails to establish that Mr. Whitver was unavailable to the employer while he was off work. The evidence fails to establish that the prescription pain medication would have interfered with Mr. Whitver's ability to engage in meaningful discourse with the employer about the possible consequences of his April 16 conduct.

Because the evidence fails to establish a current act of misconduct, the administrative law judge concludes that Mr. Whitver was discharged for no disqualifying reason. Accordingly, Mr. Whitver is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Whitver.

DECISION:

The Agency representative's July 16, 2009, reference 01, 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs