

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VIRGIL P THOMAS

Claimant

APPEAL NO. 13A-UI-08812-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WILLIAMS BULK TRANSFER INC

Employer

OC: 07/07/13

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Virgil Thomas filed a timely appeal from the July 30, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 7, 2013. Mr. Thomas participated. Dan Culhane represented the employer and presented testimony through Cory Hoffmann and Erin Miller. Exhibits One through Eight 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: Virgil “Butch” Thomas was employed by Williams Bulk Transfer as a full-time Coal Handler 3 from 2006 until March 28, 2013, when Cory Hoffman, General Manager, discharged him from the employment. Mr. Hoffmann was Mr. Thomas’ immediate supervisor. Rod Meyer, Lead Coal Handler, also had supervisory authority over Mr. Thomas’ employment. Mr. Thomas’ duties involved loading coal into the trailers pulled by semis. Mr. Thomas used an end loader to perform the work. Mr. Thomas had the ability to properly operate the end loader.

The final incident that triggered the discharge occurred on March 26, 2013. On that day, Mr. Thomas damaged the upper most portion of a semi trailer that belonged to another company as he was loading coal into the trailer. At the time of the accident, Mr. Thomas was also keeping an eye on mobile conveyors that were stacking the coal in piles. Immediately before the loading accident, Mr. Thomas had called over the radio for help with moving the conveyers. Help had not yet arrived at the time of the loading accident. Immediately following the loading accident, Mr. Thomas left work early without authorization. Before he left, Mr. Thomas told his coworkers he was leaving the accident situation for them to address. Mr. Thomas was not supposed to leave his work station without someone to step into his position. Mr. Thomas left the dome where he was working without another coal handler to relieve him. Mr. Thomas left without completing an incident report, though he knew he was supposed to complete an incident report in connection with workplace accidents.

The employer considered other incidents in making the discharge Mr. Thomas from the employment. In 2009, Mr. Thomas caused a locomotive to derail when he prematurely released the breaks on the locomotive. Mr. Thomas knew to safely operate the locomotive. In 2011, Mr. Thomas lost a carbon monoxide monitor and failed to report that fact to his supervisors. Mr. Thomas was to wear the device at all times to prevent him from being overwhelmed by carbon monoxide fumes while he performed his work. Mr. Thomas had a backup device that he wore after he lost the first one. When Mr. Thomas had not reported the loss of the device three days after another employee had located it, the employer notified Mr. Thomas that a coworker had turned in the device and the employer issued a reprimand to Mr. Thomas. In May 2012, Mr. Thomas damaged the hand rails on a locomotive while he was operating the end loader early in the morning. Mr. Thomas was moving some sawhorses with the end loader, knew that part of a sawhorse was hanging out of the bucket, tried to squeeze through a tight space and hit the locomotive hand rails instead.

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).

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 evidence in the record establishes that Mr. Thomas was careless in operating the end loader in connection with the final incident that triggered the discharge. The evidence does also indicate that Mr. Thomas was trying to perform two duties at once at the time, the other being monitoring the coal conveyor belts. The weight of the evidence does also indicate that Mr. Thomas left his work station prematurely, rather than waiting for someone to relieve him at his post before he left. The evidence indicates that Mr. Thomas was frustrated and was in a hurry to leave the workplace, rather than deal appropriately with the accident he had caused. Mr. Thomas was negligent in failing to prepare an incident report before he left work on the day of the accident. The next most recent incident that factored in the discharge was another incident with the end loader in May 2012, ten months earlier. Both incidents involve Mr. Thomas not paying sufficient attention to work he was performing with a piece of heavy equipment that he used on a daily basis. The 2011 incident concerned a failure to report a missing safety device to the employer. The 2009 incident concerned a failure to follow proper procedure for starting the locomotive. While there were four isolated incidents of ordinary negligence, the weight of the evidence fails to establish a *pattern* indicating a wanton and willful disregard of the employer’s interests. While it was within the employer’s discretion to end the employment, the weight of the evidence does not establish misconduct in connection with the employment. Mr. Thomas is eligible for benefits, provided he is otherwise eligible. The employer’s account may be charged for benefits.

DECISION:

The agency representative's July 30, 2013, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css