IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TERRY M SILLIMAN
Claimant

MADDEN LTD
Employer

APPEAL NO. 11A-UI-12246-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/07/11
Claimant: Appellant (5)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Terry Silliman filed a timely appeal from the September 8, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 10, 2011. Mr. Silliman participated. Al Irey, General Manager, represented the employer Exhibits A, B, C and E were received into evidence.

ISSUE:

Whether Mr. Silliman separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer is a trucking company. Terry Silliman was employed by Madden Ltd. as a full-time over-the-road truck driver from December 2010 until July 14, 2011. On July 14, Mr. Silliman notified the employer that he had been injured in a hit-and-run accident that occurred while he was walking through the Wal-Mart parking lot in Centerville. Mr. Silliman told the employer he had driven the employer's semi tractor to the Wal-Mart store. Mr. Silliman's story was a complete fabrication designed to conceal the true cause of his injury. Mr. Silliman had actually been injured in a domestic assault at his residence in Indianola. When Mr. Silliman appeared at the workplace on July 14, his right leg was wrapped with an ace bandage and he was using crutches. Though Mr. Silliman represented to the employer that the bandage had been put in place by Broadlawns Medical Center, it was readily apparent that the bandage job was the work of an amateur without medical or nursing training. Thus, this was another blatant fabrication. The employer contacted the Centerville Wal-Mart and the Centerville Police Department on July 14, 2011 and confirmed that the story Mr. Silliman was telling the employer was a fabrication. Al Irey, General Manager, told Mr. Silliman that he knew was lying about the manner in which he sustained the injury. While Mr. Silliman asserted he was fit to performing his trucking duties, and Mr. Silliman had driven the truck from his home to the workplace, Mr. Irey told Mr. Silliman that he could not return to work without a full medical release.

Mr. Silliman subsequently sought evaluation and treatment at Broadlawns and repeated a version of the fabrication to the Broadlawns staff, who concluded, based on the fabrication, that the injury might be work related. The injury was not work-related, but the employer nonetheless received notice from the State of Iowa that it needed to complete a first report of injury form. The employer's worker's compensation carrier did so. In the course of investigating the injury as a possible worker's compensation matter, the carrier obtained a police report from the Indianola Police Department regarding a domestic abuse incident at Mr. Silliman's residence on July 13.

Mr. Silliman subsequently learned that his tibia was broken at the knee. The injury required surgery. On August 4, Mr. Silliman underwent surgical repair of his leg. As part of that repair, a surgeon at the University of Iowa Hospitals & Clinics implanted pins and metal plates in Mr. Silliman's leg. The UIHC doctor placed Mr. Silliman's knee in an adjustable but immobilizing brace. The UIHC doctor restricted Mr. Silliman from climbing, running, and any weight-bearing activity for four weeks. Mr. Silliman would have to be able to climb to get in out of a semi tractor. Mr. Silliman would need full use of his right leg to drive.

Mr. Silliman had a follow-up appointment two weeks after his surgery and was referred to physical therapy at Broadlawns. The physical therapy was initially three times per week, but recently decreased to two times per week.

Mr. Silliman had a follow-up medical appointment at the beginning of September. Mr. Silliman continues under the care of his doctor and expects to have another follow-up medical appointment in mid-October.

Mr. Silliman indicates he has recently been diagnosed with cancer and that he believes this prevents him from returning to work at this time.

Given Mr. Silliman's dishonest statements to the employer on July 14 and given Mr. Silliman's inability to perform his trucking duties, the employer is unwilling to allow Mr. Silliman to return to the employment. In other words, Mr. Silliman effectively separated from the employment on July 14.

Since Mr. Silliman underwent surgery, he has applied for work with two Des Moines cab companies, but has not otherwise sought employment.

REASONING AND CONCLUSIONS OF LAW:

Workforce Development rule 871 IAC 24.1(113) provides as follows:

> Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
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> a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory–taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.
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> b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.

c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

The weight of the evidence in the record indicates that the employer initiated a separation from the employment on July 14, 2011.

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 with regard to a separation initiated by the employer. 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. Silliman attempted to mislead the employer on July 14 about the source of his injury, his medical condition, and the medical treatment he had received at the time, which was none. Mr. Silliman's intentional dishonesty violated his trust relationship with the employer. Mr. Silliman's intentional dishonesty would have exposed the employer to liability for further injury to the leg and risk to persons and property, had the employer not seen through the fabrication and allowed Mr. Silliman to drive a tractor-trailer rig with a broken leg. Had Mr. Silliman appeared at the workplace with the same injury and *not* intentionally misled the employer, the separation from the employment might not have disqualified him for benefits. But in this case, Mr. Silliman's intentional dishonesty was in willful and wanton disregard of the employer's interests and constituted misconduct in connection with the employment. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Silliman was discharged for misconduct. Mr. Silliman is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Silliman.

Iowa Code section 96.4-3 provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
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> 3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(1)a AND (2) provide:

> Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

Mr. Silliman has presented no medical documentation indicating that he has been released to return to work. Mr. Silliman continues under the care of a medical professional and continues to participate in physical therapy. Mr. Silliman has not made an active or earnest search for new employment since he filed his claim for benefits. The evidence establishes that Mr. Silliman has not met the work ability or availability requirements of the law since filed his claim for benefits. Benefits are denied effective August 7, 2011 and the disqualification continues at this time.

DECISION:

The Agency representative's September 8, 2011, reference 01, decision is modified as follows. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account shall not be charged. The claimant has not been able and available for work since he filed his claim for benefits. For this reason as well, benefits are denied effective August 7, 2011.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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