

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARIO R DOMINGUEZ
Claimant

APPEAL NO. 13A-UI-06096-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TEAM STAFFING SOLUTIONS INC
Employer

OC: 04/28/13
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 16, 2013, reference 01, decision that allowed benefits in connection with an April 13, 2013 separation. After due notice was issued, a hearing was held on June 28, 2013. Claimant Mario Dominguez participated. Sarah Fiedler represented the employer. Exhibits One, Two, and Three were received into evidence.

ISSUE:

Whether Mr. Dominguez was discharged from his assignment at Winegard for the reason that disqualifies him for benefits.

Whether Mr. Dominguez separated from Team Staffing Solutions, Inc., for a reason that disqualifies him for unemployment insurance benefits.

Whether the employer's account may be assessed for benefits paid to the claimant.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Team Staffing Solutions, Inc., is a temporary employment agency. Mario Dominguez commenced getting work through team staffing solutions in August 2012 and performed work in a single full-time, temporary work assignment at Winegard in Burlington. While the assignment was supposed to be full-time, there were times when Winegard did not have full-time hours available to Mr. Dominguez. Mr. Dominguez started the assignment in August 2012. Mr. Dominguez resided in Keokuk while he worked in the assignment and commuted to the assignment. Mr. Dominguez's child has asthma. Mr. Dominguez's spouse would care for the child during the times when Mr. Dominguez was scheduled to be at work. The couple shared a vehicle. The family lived in a community with a hospital and ambulance service and lived just a mile and a half from the hospital. Mr. Dominguez would elect to stay home when his child was ill because he did not want to pay for his child to be transported to the hospital if that became necessary. Mr. Dominguez's work hours were 4:30 p.m. to 2:30 a.m. Mr. Dominguez's work hours were such that regular medical appointments would likely have been scheduled outside his regular

working hours. Mr. Dominguez would often elect not to travel to the assignment because he felt he could not afford the cost of the commute. Mr. Dominguez exaggerates the cost of the commute and asserts the cost was \$100.00 per week. The length of the commute was approximately 40 miles each way and likely cost much less than Mr. Dominguez asserts. Mr. Dominguez last performed work in the assignment on April 11, 2013.

If Mr. Dominguez needed to be absent from work, Team Staffing policy required that he telephone both Team Staffing and Winegard prior to the scheduled start of his shift. The policy had been reviewed with Mr. Dominguez at that start of his employment. Team Staffing had a representative posted at the Winegard facility. For the latter half of the assignment, the Team Staffing representative at the Winegard plant had been Tammy Crawford.

The assignment ended on April 15, 2013 at the request of Winegard due to attendance. None of the absences that factored in the discharge were from days when Winegard lacked work for Mr. Dominguez.

The final absence that triggered the discharge occurred on April 12, 2013, when Mr. Dominguez was absent due to a purported lack of child care. Mr. Dominguez had left work early on April 10, 2013 due to purported child care issues. Mr. Dominguez had several prior absences that factored in the decision to end the assignment. On August 29, Mr. Dominguez was absent due to purported child care issues. Mr. Dominguez notified both Team Staffing and Winegard prior to his shift. On September 14, Mr. Dominguez was absent for personal reasons. Mr. Dominguez notified Winegard only and did so after the scheduled start of the shift. On October 25, Mr. Dominguez was absent because he had to go to court. On November 28, Mr. Dominguez was absent due to illness and properly reported the absence to both the employer and the client business. On November 13 and on December 6, Mr. Dominguez was absent for personal reasons and notified Winegard but not Team Staffing. On February 13, Mr. Dominguez was absent for personal reasons and notified Team Staffing and Winegard. On February 18, Mr. Dominguez was absent due to a lack of child care and notified only Winegard. On February 19, Team Staffing issued a written warning to Mr. Dominguez for poor attendance. On March 4, Mr. Dominguez was absent due to illness. Mr. Dominguez notified Winegard after the scheduled start of the shift, but did not notify Team Staffing. On March 5, Mr. Dominguez was absent due to illness and properly reported the absence to the employer and the client business. On March 6, Mr. Dominguez was absent due to illness and notified only Winegard. The employer issued a second written warning for attendance in connection with the absences in early March. On March 7, Mr. Dominguez left work early due to illness and properly reported the need to leave work to the Winegard supervisor and the Team Staffing representative. On March 12 and 13, Mr. Dominguez was absent due to illness and contacted only Winegard.

When Mr. Dominguez appeared for the assignment on April 15, Ms. Crawford notified him that the assignment was ended for attendance. At that time, Mr. Dominguez asked whether Team Staffing had other work available. Mr. Dominguez was interested in an assignment closer to home. Ms. Crawford told Mr. Dominguez it would likely take some time to place him in a new assignment. Mr. Dominguez understood this was due to his felony criminal record. Mr. Dominguez subsequently made contact with one of the employer's other offices on April 22 to inquire about work closer to home.

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).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The weight of the evidence establishes that Mr. Dominguez's discharge from the assignment was based on excessive unexcused absences. Mr. Dominguez was either absent due to personal reasons and failed to properly report absences due to illness on August 29, September 14, October 25, November 13, December 6, February 13 and 18, March 4, 6, 12 and 13, and April 10 and 12. Each of these absences was an unexcused absence under the applicable law. Mr. Dominguez had excused absences on November 28, March 5 and March 7. Mr. Dominguez was absent on those days due to illness and properly reported the absences to the Team Staffing and to Winegard. The evidence fails to support Mr. Dominguez's assertion that after a certain point he was only required to notify Winegard of his absences. That assertion is contradicted by the fact that Mr. Dominguez sometimes did notify both companies of his absences, even as late as March. In addition, the employer has provided additional evidence and reasonable explanation as to why the employer would not direct an employee to notify only the client business of an absence.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Dominguez was discharged for misconduct. Accordingly, Mr. Dominguez 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. Dominguez. Because Mr. Dominguez's discharge from the assignment was based on misconduct, his separation from the Team Staffing would be without good cause attributable to that employer.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

DECISION:

The Agency representative's May 16, 2013, reference 01, decision is reversed. The claimant was discharged on April 15, 2013 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 claimant's April 15, 2013 separation from the temporary employment agency was without good cause attributable to the employment agency. The employer's account will not be charged.

This matter is remanded to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs