IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DAVID M KLOPPENBURG
Claimant

ADVANCE SERVICES INC
Employer

APPEAL NO. 13A-UI-04240-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/23/12
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

David Kloppenburg filed a timely appeal from the March 28, 2013, reference 03, decision that denied benefits. After due notice was issued, a hearing was held on May 9, 2013. Mr. Kloppenburg participated. Michael Payne represented the employer. Exhibits One through Five 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: Advance Services, Inc., (ASI) is a temporary employment agency. ASI placed claimant David Kloppenburg in a full-time temporary work assignment at Pioneer. The work involved operating a forklift. Mr. Kloppenburg started the assignment in September 2012. On February 28, ASI representative Stephanie Gursky notified Mr. Kloppenburg that he was discharged from the assignment at Pioneer and from the employment at ASI. The Pioneer warehouse supervisor had requested Mr. Kloppenburg's removal from the assignment. The incident triggered the discharge occurred on February 27, 2013. On that day, Mr. Kloppenburg climbed onto his forklift for the purpose of moving it two feet or less so that another forklift operator could get by. Mr. Kloppenburg did not wear his seatbelt at the time. The Pioneer safety coordinator saw Mr. Kloppenburg operating the forklift without a seatbelt and confronted Mr. Kloppenburg about it. Pioneer required that forklift operators wear a seat belt at all times when operating a forklift. Mr. Kloppenburg was aware of the policy. When the Pioneer warehouse supervisor contacted ASI to request Mr. Kloppenburg's removal from the assignment, the warehouse supervisor alleged that the safety coordinator made additional allegations concerning Mr. Kloppenburg's conduct and comments at the time of the incident. The Pioneer warehouse manager further alleged that Mr. Kloppenburg had at least five previous "near miss" safety incidents while operating the forklift at Pioneer. ASI deemed the failure to wear the seatbelt a zero tolerance matter.

At the time Ms. Gursky notified Mr. Kloppenburg of the discharge, she referenced three prior incidents as factors in the discharge. Two were alleged no-call/no-show absences. The third concerned Mr. Kloppenburg falling asleep at a safety meeting. At the time Mr. Kloppenburg fell asleep during the safety meeting, he was on a prescription medication that made him drowsy. The first alleged no-call/no-show absence concerned Mr. Kloppenburg's absence on February 16. The second alleged no-call/no-show concerned Mr. Kloppenburg's absence on February 25.

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) 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).

The employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence to establish misconduct in connection with the employment. The employer had the ability to present testimony through Ms. Gursky or through Pioneer staff with personal knowledge of the incidents that factored in the discharge but elected not to present such testimony. The weight of the evidence indicates that the final incident that triggered the discharge was the failure to use the seatbelt on February 27 to move the forklift two feet or less to allow another operator to pass by. While the evidence does establish a violation of safety rules, the weight of the evidence also indicates that the failure to wear the seatbelt resulted from a good faith error in judgment, rather than an intention to violate the safety rules. The employer presented hearsay allegations concerning prior alleged "near miss" incidents. Those allegations fell short of proving prior safety infractions. The employer alleged two no-call/no-show absences, but again, failed to present sufficient proof to establish unexcused absences. The evidence establishes a single incident wherein Mr. Kloppenburg dozed during a safety meeting. That incidence of unintentional sleeping did not rise to the level of misconduct.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Kloppenburg was discharged for no disqualifying reason. Accordingly, Mr. Kloppenburg is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The Agency representative's March 28, 2013, reference 03, 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/css