IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

FLOYD D MULKEY
Claimant

RANDSTAD US LLC
Employer

APPEAL NO. 18A-UI-04878-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/01/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Floyd Mulkey filed a timely appeal from the April 19, 2018, reference 01, decision that disqualified him for unemployment insurance benefits and that relieved the employer's account of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Mulkey voluntarily quit the employment effective March 30, 2018 by failing to contact the temporary employment firm within three working days of completing an assignment despite being notified in writing of his obligation to make such contact. After due notice was issued, a hearing was held on May 14, 2018. Mr. Mulkey participated. Andrew Richards represented the employer. Exhibits 1 and 2 were received into evidence.

ISSUE:

Whether Mr. Mulkey separated from his work assignment or from the employment for a reason that disqualifies him for unemployment insurance benefits or that relieves the employer's account of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Randstad U.S., L.L.C. is a temporary employment agency. Randstad had a branch office located at the Kraft Heinz plant in Cedar Rapids. Kraft Heinz is the sole client of that branch. Andrew Richards is the Randstad Site Manager at that location. Floyd Mulkey was employed by Randstad as a full-time, temporary laborer at the Kraft Heinz plant during two distinct periods. The first period of employment began in May 2016 and ended in January 2017, when Mr. Mulkey completed his assignment. Mr. Mulkey separated from the employer at that time and relocated out of state. In October 2017, Mr. Mulkey commenced a new employment with Randstad and a new work assignment at the Kraft Heinz plant. In connection with the new employment, Randstad may have emailed materials for Mr. Mulkey to electronically sign. There is insufficient evidence to establish that Mr. Mulkey signed the materials in connection with the most recent employment or that the employer provided him with a copy of a policy that obligated him to contact the temp agency within three working days of the completion of an assignment. Mr. Mulkey's work hours in the employment were 1:30 p.m. to 10:30 p.m., Monday through Friday.

Mr. Mulkey last performed work for Randstad on March 26, 2018. During that shift, a Kraft Heinz supervisor sent Mr. Mulkey home early for allegedly being under the influence of alcohol. No Randstad representative was at the Kraft Heinz plant at the time. Randstad has a drug and alcohol testing policy. However, Mr. Richards asserts, erroneously, that Iowa law prohibits Randstad from engaging in alcohol and drug testing except following accidents causing injury or extensive property damage. Neither the Kraft Heinz staff nor Randstad requested that Mr. Mulkey submit to drug or alcohol testing. On the morning of March 27, 2018, Mr. Richards notified Mr. Mulkey that Kraft Heinz had ended his assignment. Because Kraft Heinz was the Randstad branch's only client, Mr. Richards and the Randstad branch did not have any more work for Mr. Mulkey. In other words, discharge from the Kraft Heinz assignment effectively discharged Mr. Mulkey from the employment. Mr. Richards did not mention to Mr. Mulkey that Randstad had another branch office in Cedar Rapids or suggest that Mr. Mulkey contact that office. Mr. Mulkey did not think to inquire.

Mr. Mulkey did not make further contact with any Randstad branch until after the April 16, 2018 fact-finding interview. At that time, Mr. Mulkey contacted another Cedar Rapids Randstad branch and was told he was ineligible for hire due to a note that the Randstad branch at Kraft Heinz had placed in his record. Mr. Mulkey was subsequently in contact with a Randstad corporate employee relations representative located in Georgia. That person advised Mr. Mulkey that he could seek employment at the other Randstad branch in Cedar Rapids, but that he would have to apply as a new hire at that branch.

REASONING AND CONCLUSIONS OF LAW:

In considering an understanding or belief formed, or a conclusion drawn, by an employer or claimant, the administrative law judge considers what a reasonable person would have concluded under the circumstances. See *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330 (Iowa 1988) and *O'Brien v. Employment Appeal Bd.,* 494 N.W.2d 660 (1993).

The weight of the evidence in the record establishes that Mr. Mulkey was discharged from the assignment and from the employment on March 27, 2018. On that date, Mr. Richards notified Mr. Mulkey that Kraft Heinz had ended the assignment. Mr. Richards and the Randstad branch he operated had no other work to offer Mr. Mulkey and made no reference to another Randstad branch. Mr. Mulkey reasonably concluded that discharge from the assignment meant discharge from the employment.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in a discharge 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).

The employer presented insufficient evidence, and insufficiently direct and satisfactory evidence to establish misconduct in connection with the assignment or the employment. The employer alleges that Mr. Mulkey was under the influence of alcohol during his shift on March 26, 2018. The employer presented no testimony from anyone with firsthand, personal knowledge of the alleged incident. The employer had the ability to present such evidence. The employer has a drug and alcohol testing policy, but did not request that Mr. Mulkey submit to drug or alcohol testing. The employer erroneously asserts that Iowa Code section 730.5, the statute that authorizes private sector drug and alcohol testing, restricts such testing to post-accident and post-injury situations. The employer presented insufficient evidence to prove, by a

preponderance of the evidence, that, Mr. Mulkey was under the influence of alcohol or any other substance on March 26, 2018.

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

DECISION:

The April 19, 2018, reference 01, decision is reversed. The claimant was discharged on March 27, 2018 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/rvs