IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ARMANDO M BUSTAMANTE
Claimant

VOLT MANAGEMENT CORPORATION
Employer

APPEAL NO. 15A-UI-02228-JT-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/01/15
Claimant: Appellant (2)

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

Iowa Code Section 96.5(1)(j) – Separation From Temporary Employment

STATEMENT OF THE CASE:

Armando Bustamante filed a timely appeal from the February 16, 2015, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that Mr. Bustamante had been discharged from the employment on January 29, 2015 for violation of a known company rule. After due notice was issued, the appeal hearing was commenced as an in-person hearing on April 22, 2015. Mr. Bustamante participated personally and was represented by attorney Jennifer Donovan. Ms. Donovan presented testimony through Mr. Bustamante. Mary Ross represented the employer. Spanish-English interpreters Anna Pottebaum and Raphael Geronimo assisted with the hearing. Exhibits One, Two, and Three were received into evidence.

The hearing could not be completed on April 22, 2015. This was due in large part to the Appeals Section not securing an interpreter as the administrative law judge has requested on April 6, 2015. The start of the hearing on April 22 was substantially delayed while the Appeals Section attempted at the last minute to secure an interpreter. Non-responsive answers from the claimant and the need for the administrative law judge to commence the next scheduled hearing were also factors in the hearing not being completed on April 22, 2015.

After due a hearing, the hearing was recommenced as a telephone hearing on May 27, 2015. Attorney Donovan represented Mr. Bustamante and presented testimony through Mr. Bustamante and Victoria Bustamante. Ms. Ross represented the employer. Spanish-English interpreter Olga Esparza assisted with the hearing. Exhibit A was received into evidence.

ISSUES:

Whether the claimant was discharged from the temporary work assignment at ADM for a reason that disqualifies him for unemployment insurance benefits or that relieves the employer, Volt Management Corporation, of liability for benefits.

Whether the separation from the temporary employment agency was for good cause attributable to the temporary employment agency.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Volt Management Corporation is a temporary employment agency. Armando Bustamante is a Spanish speaking person with limited English language skills. Mr. Bustamante is from Mexico and has minimal education. Mr. Bustamante at times struggles with appropriately comprehending information communicated to him and responding to the communication, even when the communication is in Spanish. Mr. Bustamante's participation in the appeal hearing, and the concerns raised by ADM, suggest that the claimant has an undiagnosed cognitive disability. In the fall of 2014, Mr. Bustamante commenced his employment with Volt Management Corporation and that employer placed Mr. Bustamante in a full-time, temp-to-hire work assignment at ADM Processing in Des Moines. Mr. Bustamante performed cleaning duties at ADM. The cleaning duties involved removing grain and grain dust from the facility. Mr. Bustamante's usual work hours were 7:00 a.m. to 3:30 p.m., Monday through Friday. Mr. Bustamante last performed work in the assignment on January 28, 2015.

After Mr. Bustamante completed his shift on January 28, 2015, Dan James, ADM Processing Plant Superintendent, sent an email message to Mary Ross, Branch Manager for Volt Workforce Solutions. In the message, Mr. James notified Volt that ADM was ending the assignment due to a safety incident alleged to have occurred on January 27, 2015. Mr. James stated as follows:

> I was informed this afternoon that Armando was observed yesterday operating a bobcat and standing under a raised bucket of a running bobcat. This violates 3 bobcat safety rules: exiting a running bobcat, standing under a raised bucket, and unqualified operator. Three ADM employees have attempted to train Armando to safely operate a bobcat without success: union steward, Spanish speaking employee, and a supervisor. Armando has never been cleared to operate a bobcat by himself and was told not to do so on more than one occasion.
>
> We are concerned about Armando's ability to understand safety training and work instructions. Plant Safety director conducting training and Spanish speaking employees I schedule in the same class to assist with the language barrier have expressed concerns about his ability to comprehend training. Multiple times Armando has been given work instructions and has been found in a completely different area of plant.
>
> I understand Armando has been taking English lessons but from my point of view his communication has become worse. Even multiple Spanish speaking employees are having trouble communicating with him.
>
> After yesterdays [sic] bobcat instance, we cannot continue his assignments at ADM. This is for his personal safety!

Mr. James did not observe the conduct in question and Volt Management Corporation did not conduct any investigation into the alleged safety violation. Mr. Bustamante had indeed operated a Bobcat or the equivalent at ADM on January 27, 2015 but did so upon the direction of a new supervisor and under the belief that his operation of the piece of equipment that day was part of authorized training. Mr. Bustamante did not leave the piece of equipment running when he exited the vehicle. Mr. Bustamante did momentarily step under the raised forks of the machine to pick up garbage that had fallen from the garbage receptacle he was carrying with the machine. On January 27, 2015, a supervisor had told Mr. Bustamante that he could no longer work at ADM because he did not speak English. Volt and ADM both knew that the claimant had limited English skills when the claimant began the assignment but thought the claimant was sufficiently proficient in English to perform work at the ADM facility. The claimant also thought he was sufficiently proficient in English to perform assigned duties. The claimant was unable to effectively absorb training and follow directives, whether the training or directive was provided in English or Spanish.
A Volt representative notified the claimant's spouse on January 28, 2015 that the assignment at ADM was done and that Volt did not have any additional work for the claimant at that time. Volt did not have an end-of-assignment policy that would have obligated the claimant to contact the employer within three days of completing an assignment to request additional work for face unemployment insurance consequences.

On January 27, 2015, the claimant's spouse had sent an email message to Volt requesting time off in the near future so that the claimant could undergo surgery to have his gall bladder removed. The request for time off was not a factor in the separation from the assignment or the employment.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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 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 the claimant unintentionally violated on or more ADM safety rules on January 27, 2015. The claimant reasonably believed that he had been authorized by the supervisor to operate the Bobcat or equivalent piece of equipment. The claimant did not fully understand the safety precautions attending his operation of the equipment and made a good faith error in judgment when he momentarily stepped beneath the raised forks to pick up some trash that had fallen from the container he was carrying with the piece of equipment. The evidence fails to establish an intentional disregard of Volt or ADM policies or interests. The claimant was discharged from the assignment with ADM and from the employment with Volt for no disqualifying reason. Accordingly, the claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

Iowa Code § 96.5-1-j provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department, but the individual shall not be disqualified if the department finds that:

> j. The individual is a temporary employee of a temporary employment firm who notifies the temporary employment firm of completion of an employment assignment and who seeks reassignment. Failure of the individual to notify the temporary employment firm of completion of an employment assignment within three working days of the completion of each employment assignment under a contract of hire shall be deemed a voluntary quit unless the individual was not advised in writing of the duty to notify the temporary employment firm upon completion of an employment assignment or the individual had good cause for not contacting the temporary employment firm within three working days and notified the firm at the first reasonable opportunity thereafter.
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> To show that the employee was advised in writing of the notification requirement of this paragraph, the temporary employment firm shall advise the temporary employee by requiring the temporary employee, at the time of employment with the temporary employment firm, to read and sign a document that provides a clear and concise explanation of the notification requirement and the consequences of a failure to notify. The document shall be separate from any contract of employment and a copy of the signed document shall be provided to the temporary employee.
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> For the purposes of this paragraph:
>
> (1) "Temporary employee" means an individual who is employed by a temporary employment firm to provide services to clients to supplement their work force during absences, seasonal workloads, temporary skill or labor market shortages, and for special assignments and projects.
>
> (2) "Temporary employment firm" means a person engaged in the business of employing temporary employees.

Iowa Admin. Code r. 871-24.26(19) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (19) The claimant was employed on a temporary basis for assignment to spot jobs or casual labor work and fulfilled the contract of hire when each of the jobs was completed. An election not to report for a new assignment to work shall not be construed as a voluntary leaving of employment. The issue of a refusal of an offer of suitable work shall be adjudicated when an offer of work is made by the former employer. The provisions of Iowa Code section 96.5(3) and rule 24.24(96) are controlling in the determination of suitability of work. However, this subrule shall not apply to substitute school employees who are subject to the provisions of Iowa Code section 96.4(5) which denies benefits that are based on service in an educational institution when the individual declines or refuses to accept a new contract or reasonable assurance of continued employment status. Under this circumstance, the substitute school employee shall be considered to have voluntarily quit employment.

The employer lacked an end-of-assignment policy that would have obligated the claimant to contact the employer within three working days to request a new assignment. Accordingly, the claimant fulfilled his obligation to Volt when the assignment at ADM was completed. The claimant's January 28, 2015 separation from the temporary employment agency was for good cause attributable to the employer. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

DECISION:

The February 16, 2015, reference 01, decision is reversed. The claimant was discharged from the assignment and from employment on January 28, 2015 for no disqualifying reason. The claimant's January 28, 2015 separation from the temporary employment agency was for good cause attributable to the employer. The claimant is eligible for benefits provided he is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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