IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ANDY B BRONFEIN
Claimant

CRST VAN EXPEDITED INC
Employer

APPEAL NO. 10A-UI-03763-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/07/10
Claimant: Respondent (5)

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

STATEMENT OF THE CASE:

The employer appealed from an unemployment insurance decision dated March 1, 2010, reference 01, that allowed benefits. A telephone hearing was scheduled for April 26, 2010. Claimant Andy Bronfein participated. Sandy Matt, Human Resources Specialist, represented the employer. Exhibit One was received into evidence. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant.

ISSUE:

Whether Mr. Bronfein 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: Andy Bronfein was employed by CRST Van Expedited, Inc., as a full-time over-the-road team truck driver. Mr. Bronfein's immediate supervisor was Charm White, Fleet Manager. Mr. Bronfein started the employment in April 2009 and last performed work for the employer on October 3, 2009. At that point, Mr. Bronfein started his scheduled time off. Mr. Bronfein was injured in a motor vehicle accident while he was off-duty and suffered injury to his ribs. Mr. Bronfein received medical evaluation of his injury and his doctor took him off work until the injury to his ribs healed. Mr. Bronfein contacted Charm White to notify her of his injury and of his need to be off work. Mr. Bronfein or his doctor provided the employer with medical documentation to support Mr. Bronfein's need to be off work. Mr. Bronfein did not know on what specific day he would be released to return to work, but intended to return as soon as he was released by his doctor. Mr. Bronfein maintained appropriate contact with his supervisor while he was off work due to his injury. On November 11, 2009, Mr. Bronfein's doctor released him to return to work without restrictions.

The employer has a policy under which a driver who has been away from work more than 19 days is removed from the employer's active roster of drivers and a driver who has been away from work more than 30 days is deemed to have separated from the employment. Under the

employer's policy the employer retains the authority to exercise discretion to decide whether to rehire a driver deemed to have separated from the employment under the above circumstances.

On October 20, 2009, the employer documented that Mr. Bronfein had voluntarily separated from the employment for health reasons, specifically, due to cracked cartilage in his ribs and the need to take prescription pain medication. The employer did not notify Mr. Bronfein that it had documented a separation from the employment.

During the period when Mr. Bronfein was performing work for the employer, Mr. Bronfein had relocated from Maryland to Arizona. Mr. Bronfein worked out of a drop yard in California and that's where his assigned truck would remain during his scheduled days off.

On November 11, 2009, Mr. Bronfein began his attempts to contact the employer to advise that he had been released to return to work without restrictions. After multiple attempts to contact the employer, Mr. Bronfein heard back from Recruiter Corey Richmond on Monday, November 16, 2009. Mr. Richmond told Mr. Bronfein that because he had relocated to Arizona, and because he was now considered a rehire rather than an existing employee, the employer would only take Mr. Bronfein back if he secured and provided his own driving partner or if he moved to California. Mr. Bronfein did not have a driving partner and was not willing to move to California after just having moved to Arizona. Because Mr. Bronfein lacked a driving partner and was not willing to move to California, the employer refused to make work available to Mr. Bronfein.

Mr. Bronfein continued his attempt to return to the employment by contacting a higher level manager in December 2009, but was not successful in his attempt to return to the employment. Mr. Bronfein started his search for new employment as soon as it was clear the employer would not allow him to return. Mr. Bronfein made an active and earnest search for new full-time employment and started new full-time employment on April 2, 2010. Mr. Bronfein had established his claim for unemployment insurance benefits on February 7, 2010. Mr. Bronfein discontinued his claim for unemployment insurance benefits with the week that ended March 27, 2010.

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.
>
> 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.

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).

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 administrative law judge notes that the employer did not provide testimony from either Ms. White or Mr. Richmond. Ms. White was the person who would have had personal knowledge regarding the circumstances under which Mr. Bronfein commenced his time off work and the understanding the employer had with Mr. Bronfein at that time or during his time away from work. Mr. Richmond was the person who would have had personal knowledge concerning the conversation the employer had with Mr. Bronfein regarding the circumstances under which the employer would allow Mr. Bronfein to return to the employment. The administrative law judge concludes that the employer had the ability to present testimony from both individuals. The employer representative and the employer's sole witness at the hearing, Sandy Matt, lacked personal knowledge regarding material facts.

The weight of the evidence in the record indicates that in early October 2009, Mr. Bronfein was injured off-duty, appropriately contacted the employer to advise of the injury, and started what he reasonably believed was an approved leave of absence. Mr. Bronfein did not voluntarily quit the employment or any point suggest to the employer that he desired to separate from the employment. The conclusion that Mr. Bronfein did not voluntarily separate from the employment is supported by the ongoing contact Mr. Bronfein initiated with the employer regarding his healing process. The weight of the evidence indicates that the employer discharged Mr. Bronfein from the employment on October 20, 2009. The employer indicated in the termination document that Mr. Bronfein could not return to the employment without some type of review. The employer's policy called for an automatic separation from the employment after 30-days' absence from the employment. Mr. Bronfein had been away from work less than three weeks at the time the employer documented a separation. The weight of the evidence establishes that the employer discharged Mr. Bronfein from the employment while he was on what he reasonably believed was an approved leave of absence. The weight of the evidence indicates that Mr. Bronfein was released to work without restrictions effective November 11, 2009 and appropriately reported this information to the employer. The employer refused to allow Mr. Bronfein to return to the employment unless he found a team driving partner or moved to a different state. The employer had earlier acquiesced in Mr. Bronfein's move to Arizona during the course of the employment.

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.
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> 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.

Because the evidence establishes no misconduct whatsoever, the administrative law judge concludes that Mr. Bronfein was discharged for no disqualifying reason and is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

The outcome of this case would be the same if the administrative law judge had concluded Mr. Bronfein's injury-based absence had been a voluntary quit. This is so because the injury necessitated the absence, the absence was based on the advice of a physician, Mr. Bronfein recovered from the injury and returned to offer his services, but the employer refused to make work available. See Iowa Code section 96.5(1)(d). See also 871 IAC 24.26(6)(a). The law does not impose the additional hurdles the employer imposed before it would allow Mr. Bronfein to return to the employment. Mr. Bronfein's inability or unwillingness to satisfy these additional hurdles would not prevent him from satisfying the requirements of Iowa Code section 96.5(1)(d) or 871 IAC 24.26(6)(a).

The outcome in this case would also have been the same if the administrative law judge had concluded the separation took the form of an "other separation." The separation was based on Mr. Bronfein's physical inability to meet the physical demands of the employment. This would not prevent Mr. Bronfein from being eligible for unemployment insurance benefits, provided he was able to work and available for work once he established his claim for benefits.

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:
>
> 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.

The weight of the evidence indicates that Mr. Bronfein had been released to return to work without restrictions in November 2009, months before he established his claim for unemployment insurance benefits. The evidence indicates that Mr. Bronfein made an active and earnest search for new employment that resulted in new full-time employment that Mr. Bronfein started on April 2, 2010. Mr. Bronfein met both the work ability and work availability requirements of Iowa Code section 96.4(3) from February 7, 2010 through March 27, 2010, after which he discontinued his claim. Thereafter, Mr. Bronfein returned to full-time employment and no longer met the work “availability” requirements of Iowa Code section 96.4(3). Mr. Bronfein was eligible for benefits he received for February 7, 2010 through March 27, 2010, provided he was otherwise eligible.

DECISION:

The Agency representative’s March 1, 2010, reference 01, decision is modified as follows. The claimant was discharged for no disqualifying reason and was eligible for benefits, provided he was otherwise eligible. The employer’s account may be charged. The claimant was able and

available for work from February 7, 2010 through March 27, 2010, and was eligible for the benefits he received for that period, provided he was otherwise eligible.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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