

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MAX M VALDEZ
Claimant

APPEAL NO. 12A-UI-02751-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**EZ PAYROLL
& STAFFING SOLUTIONS LLC**
Employer

OC: 01/29/12
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from an unemployment insurance March 8, 2012, reference 01, decision that allowed benefits and that indicated the employer's account could be charged. After due notice was issued, a hearing was held on April 4, 2012. Claimant Max Valdez participated. Britney Ray represented the employer. Exhibits One through Four 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: The employer, EZ Payroll & Staffing Solutions. L.L.C., provides on-site staffing services to ALPLA, a bottle manufacturer located in Iowa City. Max Valdez was employed by EZ Payroll & Staffing Solutions to work in a full-time "temp-to-hire" position at ALPLA. Mr. Valdez commenced the employment on November 29, 2010 and last performed work for EZ Payroll & Staffing Solutions and ALPLA on January 25, 2012.

At the beginning of December 2011, ALPLA began to consider Mr. Valdez for direct employment with ALPLA. In connection with that process, ALPLA and EZ Payroll & Staffing Solutions had Mr. Valdez provide written authorization for a background search that would include a search of his criminal record. Mr. Valdez had also provided written authorization for such a search back on November 29, 2010.

On January 26, 2012, Britney Ray, Iowa City branch manager for EZ Payroll & Staffing Solutions, notified Mr. Valdez that he was discharged from the employment because a criminal history search had brought to light an assault conviction. The conviction in question was for simple misdemeanor assault. The date of offense was October 31, 2010. The date of judgment and sentencing was December 14, 2010. The offense did not occur on the premises of EZ

Payroll & Staffing Solutions or ALPLA, did not involve anyone associated with either company, and had no connection at all to the employment. Prior to January 26, 2012, neither EZ Payroll & Staffing Solutions nor ALPLA had notified Mr. Valdez that he could be subject to discharge based on a criminal conviction. ALPLA did have a policy that candidates for employment who had various criminal convictions could not be considered for employment, but this policy had never been shared with Mr. Valdez prior to January 26, 2012. When ALPLA decided not to employ Mr. Valdez and to end his assignment, EZ Payroll & Staffing followed suit because ALPLA was their only client.

Mr. Valdez had a 2009 conviction for Possession of a Controlled Substance, a serious misdemeanor, which appears to have also shown up as part of the criminal history check, but the employer did not mention that conviction or the associated probation revocation when discharging Mr. Valdez from the employment.

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).

The evidence fails to establish misconduct *in connection with the employment*. See Iowa Code section 96.5(2)(a). The fact that Mr. Valdez incurred a *non-work-related* criminal conviction during the period of the employment cannot serve as a basis for a finding of misconduct *in connection with the employment* absent a policy that extended to off-duty misconduct, a policy that obligated Mr. Valdez to disclose the conviction, and appropriate and timely notice to Mr. Valdez of such policy.

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

DECISION:

The Agency representative's March 8, 2012, reference 01, decision is affirmed. 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw