

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEVIN P SWITZER
Claimant

APPEAL NO. 11A-UI-02783-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BLUE MAX
Employer

OC: 12/26/10
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the March 1, 2011, reference 03, decision that denied benefits. After due notice was issued, a hearing was held on March 30, 2011. Claimant participated. Jennifer Hall, Human Resources Manager, represented the employer and presented additional testimony through Billy Walpole, General Manager Charleston Division.

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: Kevin Switzer was employed by Blue Max as a full-time truck driver from October 2010 until January 15, 2011, when Billy Walpole, General Manager Charleston Division, discharged him from the employment. Mr. Walpole was Mr. Switzer's immediate supervisor. The employer discharged Mr. Switzer based on a zero-tolerance policy concerning causing damage to one Blue Max truck with another. The policy is in the employee handbook the employer provided to Mr. Switzer at the start of his employment. In such incidents, the offending employee was subject to immediate termination. On January 15, 2011, Mr. Switzer was backing his assigned truck into a spot at the Charleston yard. Mr. Switzer's use of the passenger side outside mirror was hindered by the sun. Mr. Switzer attempted to back his truck into a spot using only his driver side mirror. Mr. Switzer backed his truck into another and caused damage. Mr. Walpole arrived and investigated. Mr. Walpole told Mr. Switzer of the zero-tolerance policy, but suggested there might be a way for Mr. Switzer to stay on. Mr. Switzer telephoned Mr. Walpole the following Monday as directed. At that time, Mr. Walpole told Mr. Switzer that the policy would indeed be enforced and that Mr. Switzer was discharged from the employment. There was no other basis for the employer's decision to end Mr. Switzer's 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).

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 the employer discharged Mr. Switzer based on a single, isolated incident of negligent. Mr. Switzer was indeed negligent by failing to ensure he had backing room before he backed his truck into a spot. If the right side mirror could not be used, a reasonable person would have gotten out of the truck to ensure adequate backing room or would have enlisted the assistance of another person so that the truck could be safely backed into the awaiting spot. The evidence fails to establish that Mr. Switzer acted with a willful or wanton disregard of the employer's interests. The isolated incident of negligence would not constitute misconduct in connection with the employment and would not be sufficient to disqualify Mr. Switzer for unemployment insurance benefits. Mr. Switzer was discharged for no disqualifying reason. Accordingly, Mr. Switzer is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Switzer.

DECISION:

The Agency representative's March 1, 2011, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css