

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**GEORGE A KINSHAW**  
Claimant

**APPEAL NO. 18A-UI-06392-S1-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 05/13/18**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

George Kinshaw (claimant) appealed a representative's June 4, 2018, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with Hy-Vee (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for June 27, 2018. The claimant participated personally. The employer participated by Matt Beenblossom, Vice President of Distribution, and Chad Master, Director of Transportation. The employer offered and Exhibit 1 was received into evidence.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on June 20, 2011, as a full-time truck driver. The claimant signed for receipt of the employer's handbook on January 31, 2012. The employer and claimant were also bound by a collective bargaining agreement.

The employer had some letters from 2012, addressed to the claimant regarding Department of Transportation regulation violations. None of the letters were signed by the claimant. None of the documents contained warnings indicating the claimant could be terminated for further infractions. The claimant remembered the employer talking to him once about a violation.

The Chariton Distribution Policy/Procedure Policy #58: Overnight Deliveries was revised on October 1, 2014. The claimant's signature did not appear on the document showing that he received the policy/procedure. The document allows drivers in certain circumstances to stay at approved hotels. Drivers are not allowed to take tractor-trailers home and spend the night without approval. The employer may discipline the employee if the policy is violated.

On March 31, 2018, at 11:59 p.m., the claimant was nearing the end of his maximum time period to drive and pulled off on the shoulder of Highway 5 at Super 8 Centerville in Centerville,

Iowa. He checked into the motel and returned to his tractor trailer to park it in a spot he thought was large enough to accommodate the vehicle. The motel lot did not have a location to park the tractor-trailer and the claimant was running out of time to drive. At 12:06 a.m. on March 31, 2018, the claimant drove to his home, approximately thirty miles from the motel, and secured the vehicle. The trailer was empty. He did not call dispatch because dispatch leaves work at 9:00 p.m. on Saturday nights. He returned to the motel in his personal vehicle and spent the night. The following day he retrieved the tractor-trailer from his home and proceeded with his trip.

On or about April 3, 2018, a new member of management questioned the claimant about the location of the semi when a bill for a motel was sent to the employer. The claimant was hesitant to explain what had happened because he did not know who the person was and it was the claimant's day off. The claimant continued to work for the employer. On April 28, 2018, the employer terminated the claimant for dishonesty. The employer thought the claimant spent the night in his home because the truck did not move. The employer waited twenty-five days to terminate the claimant because it had to speak with its attorney and request a bill from the motel.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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).

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident provided by the employer occurred on April 1, 2018. It learned of the incident on April 3, 2018. The claimant was not discharged until April 28, 2018. No good reason was given by the employer for the delay in suspending the claimant from employment. The employer has failed to provide any evidence of willful and deliberate misconduct which was the final incident leading to the discharge and disqualification may not be imposed.

#### **DECISION:**

The representative's June 4, 2018, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs