

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**ROBERT DE LOS SANTOS**  
Claimant

**APPEAL NO. 19A-UCFE-00002-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**US POSTAL SERVICE**  
Employer

**OC: 12/09/18**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Robert De Los Santos filed a timely appeal from the December 28, 2018, reference 01, decision that held he was disqualified for benefits and the employer's account would not be charged, based on the deputy's conclusion that Mr. De Los Santos was placed on a disciplinary suspension on December 6, 2018 for violation of a company rule. After due notice was issued, a hearing was held on January 17, 2019. Mr. De Los Santos participated. The employer did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Exhibit A was received into evidence.

**ISSUE:**

Whether the claimant was suspended and/or 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: Robert De Los Santos was employed by the United States Postal Service as a full-time Rural Mail Carrier until December 7, 2018, when Post Master Mark Klunder indefinitely suspended him from the employment. On December 6, 2018, Mr. De Los Santos hit a utility worker while operating his mail delivery vehicle on a gravel road. As Mr. De Los Santos approached the stretch of gravel road in question, he noted a wood chipping utility truck and trailer on the left side of the road that was taking up a considerable portion of the road. Mr. De Los Santos also observed three utility workers outside the truck and in the vicinity of the truck. Mr. De Los Santos observed that one of the utility workers was standing in the middle of the travel portion of road. Mr. De Los Santos estimates that he was 30 to 40 feet from the utility workers at the time he observed the utility workers. Mr. De Los Santos noted that there was no "men working" sign displayed. Mr. De Los Santos was under time constraints to complete his delivery route. Mr. De Los Santos activated the flashing light on his mail delivery vehicle and honked his horn. The utility worker standing in the middle of the travel portion of the road was wearing hearing protection ear plugs in connection with use of the wood chipper. Rather than bring his mail delivery vehicle to a stop or slow crawl to prevent or avoid a collision, Mr. Los Santos moved to the far side of the road, reduced his speed to 30 miles per hour, and attempted to squeeze by the pedestrian worker. Mr. De Los Santos hit the utility worker with the front driver side corner of his vehicle and forcefully knocked the utility worker to the ground.

Mr. De Los Santos was immediately aware that he had hit the utility worker. Though Mr. De Los Santos asserts the gravel road was icy, he was able to pull over 15 to 20 feet past the point of the collision. At that point, the other utility workers were assisting the injured utility worker. Mr. De Los Santos observed lacerations on the injured utility worker's head, and observed blood and ear plugs on the ground. Mr. De Los Santos called 911 to summon paramedics and provided his phone to the utility workers so they could provide identifying information regarding the injured utility worker. Mr. De Los Santos contacted the Postal Service to report the incident and to request that another carrier collect the mail and continue delivery of the mail. Post Master Mark Klunder was not at work at that time, so Mr. De Los Santos spoke to a clerk. The clerk had no authority over Mr. De Los Santos employment, but told Mr. De Los Santos that he would not be able to return to work until after he completed safe driver school.

On December 7, 2018, Mr. De Los Santos received written notice from Post Master Mark Klunder that he was being placed in "off-duty without pay" status based on having been injurious to himself or others by striking a person. The notice reminded Mr. De Los Santos of his right to grieve the decision. Mr. De Los Santos contacted a union representative to commence the grievance process. On December 11, 2018, Mr. De Los Santos and the union representative met with Post Master Klunder as part of the grievance process. Mr. De Los Santos provided a formal statement at that time, but was not allowed to return to work at that time. On January 3, 2019, Mr. De Los Santos received written notice that the Postal Service planned to move forward with removing Mr. De Los Santos from his position within the next 30 days. The decision reminded Mr. De Los Santos of his right to grieve the removal decision. The employer has not allowed Mr. De Los Santos to return to the employment. Mr. De Los Santos has conferred with a union representative and understands, based on that contact, that he is still considered a Postal Service employee until the grievance process is exhausted or the employer allows him to return to work.

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

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).

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).

Iowa Administrative Code rule 871-24.32(9) provides as follows:

Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

Iowa Code section 321.285 provides in relevant part as follows:

Speed restrictions.

1. Any person driving a motor vehicle on a highway shall drive the same at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface, and width of the highway and of any other conditions then existing, and no person shall drive any vehicle upon a highway at a speed greater than will permit the person to bring it to a stop within the assured clear distance ahead, such driver having the right to assume, however, that all persons using said highway will observe the law.

...

3. Unless otherwise provided in this section or by other speed restrictions, the speed limit for all vehicular traffic shall be fifty-five miles per hour.

4. A reasonable and proper speed is required, but not greater than fifty-five miles per hour at any time between sunrise and sunset, and not greater than fifty miles per hour at

any time between sunset and sunrise, on secondary roads unless such roads are surfaced with concrete or asphalt or a combination of both, in which case the speed limits shall be the same as provided in subsection 3.

Iowa Code section 321.277 provides as follows:

Reckless driving.

Any person who drives any vehicle in such manner as to indicate either a willful or a wanton disregard for the safety of persons or property is guilty of reckless driving. Every person convicted of reckless driving shall be guilty of a simple misdemeanor.

Despite the employer's failure to participate in the appeal hearing, the evidence in the record establishes a suspension and effective discharge for misconduct in connection with the employment. The evidence in the record establishes that on December 6, 2018 Mr. De Los Santos operated a mail delivery vehicle on a gravel road in a manner that indicated a wanton disregard for the safety of the pedestrian utility worker that he hit and injured with the vehicle. Mr. De Los Santos had sufficient notice of the presence of the utility workers so that he could slow to a crawl or stop to avoid hitting the utility worker. Mr. De Los Santos was in a hurry and made a conscious decision to travel dangerously close to the pedestrian utility worker at a speed that was inherently unreasonable, excessive, and dangerous under the existing conditions. Mr. De Los Santos' reckless operation of the mail delivery vehicle demonstrated a willful and wanton disregard of the employer's interests in maintaining safe operations, in preserving public confidence in its operations, and in avoiding unnecessary exposure to financial risk.

Because the evidence in the record establishes a discharge for misconduct in connection with the employment, Mr. De Los Santos is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. De Los Santos must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

**DECISION:**

The December 28, 2018, reference 01, decision is affirmed. The claimant was suspended and effectively discharged on December 7, 2018 for misconduct in connection with the employment. The claimant is disqualified for unemployment insurance benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs