IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MCCOY, TRACEY, L
Claimant

KELLY CORTUM INC
Employer

APPEAL NO. 12A-UI-10434-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/19/12
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Tracey McCoy filed a timely appeal from the August 22, 2012, reference 03, decision that denied benefits. After due notice was issued, a hearing was held on September 25, 2012. Mr. McCoy participated personally and was represented by Attorney Jeffrey Lipman. Kelly Cortum represented the employer and presented additional testimony through Cindy Simpson.

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: Tracey McCoy was employed by Kelly Cortum, Inc., as a full-time dump truck driver from March 2012 until August 3, 2012, when Kelly Cortum, Owner and President, discharged him in response to a rollover accident that occurred on Monday, July 30, 2012. On July 30, Mr. McCoy was hauling dirt to a job site. As Mr. McCoy was dumping a load of dirt, the back wheels of his truck sunk into the dirt mound beneath the truck and the truck rolled onto its side. It had recently rained and that was a factor in the rollover accident. Mr. Cortum responded to the scene of the accident and initially concluded that the truck was totaled. Employer did not have another truck available for Mr. McCoy to operate and that was a substantial factor in the decision to discharge Mr. McCoy from the employment.

The employer had hired Mr. McCoy to perform commercial truck driving duties despite being aware that Mr. McCoy had a prior OWI conviction. Early in the employment, the employer had notified Mr. McCoy that the insurance company was putting him on "probation" for a year. At the time of the rollover accident, the employer was concerned that the insurance company would exclude Mr. McCoy from coverage in the future. However, at the time the employer discharged Mr. McCoy from the employment, the employer had no information from the insurance company to indicate that the insurer was in fact going to withdraw coverage. The employer decided not to wait for such information before discharging Mr. McCoy from the employment.

In making the decision to discharge Mr. McCoy from the employment, the employer considered a complaint received from the husband of a motorist on Friday, July 27, that a driver of one of the employer's trucks, purportedly the truck number operated by Mr. McCoy, had run the complainant's spouse off the road. Mr. McCoy had no knowledge of the incident in question. The employer also had complaints from other motorists concerning driving conduct the employer attributed to Mr. McCoy.

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 weight of the evidence fails to establish misconduct in connection with the employment. The evidence establishes that Mr. McCoy may have been careless or negligent in connection with the rollover accident. The evidence does not show that Mr. McCoy had any intent to put the employer's truck at risk in connection with the rollover accident. The employer's decision to discharge Mr. McCoy from the employment was not based on a loss of insurability on the part of Mr. McCoy, as the employer had not heard anything from the insurer up to the time of the discharge to indicate that insurer was in fact withdrawing coverage for Mr. McCoy's operation of the employer's equipment. The evidence concerning the alleged offensive driving conduct does not rise above the level of unsubstantiated allegation and is not proof of carelessness, negligence or intentional misconduct.

While it was within the employer's discretion to end the at-will employment, the evidence is insufficient to establish misconduct in connection with the employment that would disqualify Mr. McCoy for unemployment insurance benefits. Mr. McCoy is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

DECISION:

The Agency representative's August 22, 2012, 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/css