IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KAREN D ANTHONY
Claimant

CRST VAN EXPEDITED INC
Employer

APPEAL NO. 12A-UI-12959-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/05/12
Claimant: Respondent (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 17, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 3, 2012. Claimant Karen Anthony participated. Sandy Matt represented the employer. Exhibits One through Six were received into evidence.

ISSUES:

Whether Ms. Anthony was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the discharge was based on a current act. The administrative law judge concludes that the discharge was not based on a current act and that Ms. Anthony was therefore discharged for no disqualifying reason.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Karen Anthony was employed by CRST Van Expedited, Inc., as a full-time over-the-road truck driver from 2007 until August 2, 2012, when the employer discharged her based on a speeding citation she received on May 31, 2012 and to which she plead guilty on June 18, 2012.

On May 31, 2012, Ms. Anthony had in fact traveled more than 15 miles above the posted speed limit in the employer's tractor-trailer rig. A week later, Ms. Anthony reported the matter to her immediate supervisor, Fleet Manager Mike Wuestenberg. Ms. Anthony reported the matter to Mr. Wuestenberg in part because she needed an advance to pay the substantial fine. Mr. Wuestenberg provided the advance. Mr. Wuestenberg also directed Ms. Anthony to make a copy of the citation and send it to him, which Ms. Anthony did. Ms. Anthony paid the fine on June 18, 2012.

The employer ran a motor vehicle report on Ms. Anthony on June 28, 2012. The May 31 citation and the June 18 conviction showed up on the June 28, 2012 motor vehicle report.

Thereafter, the employer had Ms. Anthony complete an annual review form. The employer's policy required that Ms. Anthony list all moving violations from the preceding 12 months when she completed the review form. Ms. Anthony listed the May 31 citation when she completed the form. The employer then waited until August 2 to notify Ms. Anthony that she was discharged for failing to report the citation to the Safety Department and for incurring a serious moving violation.

The employee handbook contained a policy that required employees to immediately report all moving violations, including warning tickets to the employer's Safety department. At the time of hire, Ms. Anthony signed for receipt of a copy of the handbook that included the policy. The handbook Ms. Anthony did not contain a policy that said she was subject to discharge in connection with a speeding ticket that exceeded the speed limit by a particular number of miles per hour. However, the handbook Ms. Anthony received indicated that she would be subject to discharge for a serious moving violation.

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 fails to establish a current act of misconduct. The citation that eventually led to the discharge occurred on May 31, 2012 and came to the employer's attention a week later. The employer had the record of conviction on June 28, 2012. The employer then waited until August 1, 2012 to tell Ms. Anthony that the May 31 incident could or would prompt her discharge from the employment. The employer's delay in addressing the citation and policy violation with Ms. Anthony was unreasonable under the circumstances.

Because the evidence fails to establish a current act of misconduct, the administrative law judge concludes that Ms. Anthony was discharged for no disqualifying reason. Ms. Anthony is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

DECISION:

The Agency representative's October 17, 2012, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/css