IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TERRY J JONES
Claimant

CEDAR VALLEY RECYCLING & TRANSFER
Employer

APPEAL NO. 16A-UI-13062-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/06/16
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Terry Jones (claimant) appealed a representative's November 29, 2016, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with Cedar Valley Recycling & Transfer (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for December 29, 2016. The claimant participated personally. The employer participated by Blane Benham, General Manager; Scott Brunson, Sales Manager; and Edwin Miller, Supervisor.

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 August 9, 2016, as a full-time forklift operator. He had twenty-five years of experience. The claimant signed for receipt of the employer's Policy and Tasks on August 9, 2016, but he did not actually receive the document. The employer has a ninety-day probation period for new employees. The claimant mentioned numerous unsafe working conditions at work. After this, the employer began to issue him warnings.

On October 3, 2016, the employer issued the claimant a written warning for not notifying the employer of his absences on September 27, 28, 29, and 30, 2016. The employer notified the claimant that further infractions could result in termination from employment. On October 4, 2016, the employer issued the claimant a written warning for smoking in the building even though the claimant's co-workers, supervisor, and office worker smoked in the building. The employer notified the claimant that further infractions could result in termination from employment. On October 18, 2016, the employer issued the claimant a document stating he ran over another worker's tool bag while driving a skid loader in an authorized level. The claimant was not an experienced skid loader driver. The employee left the tool bag on the floor and the claimant could not see it over the bucket. The employer told the claimant he could not

drive a skid loader anymore. No warning was stated in the document. The supervisor backed into the claimant's car and damaged the taillight. The supervisor paid for the damage and continued work without incident.

On October 21, 2016, the employer noticed damage on the overhead door entering the forklift storage area. Items on a shelf over the door had fallen. The employer viewed video tape and did not see anyone causing the damage. The claimant did not cause the damage. The employer assumed the claimant caused the damage because there was paint on the forklift the claimant and others drove. The supervisor did not believe the damage was intentional. No co-workers were questioned. On October 25, 2016, the employer terminated the claimant for causing damage at work within the ninety-day probation period.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code § 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.

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 establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The grounds for discharge listed under a contract of hire are irrelevant to determination of eligibility for Job Service benefits in a misconduct situation. *Hurtado v. Iowa Department of Job Service*, 393 N.W.2d 309 (Iowa 1986). One of the reasons cited by the employer for discharging the claimant is his unsatisfactory job performance during his probationary period. A discharge solely due to a failure to satisfactorily complete a trial or probationary period of employment does not constitute misconduct, and does not in and of itself relieve the employer's account from charge. Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has not proven that the claimant was responsible for the damage to the door. If the claimant was responsible for the damage, the claimant's action was at worst the result of ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion. The mere fact that an employee might have various incidents of unsatisfactory job performance does not establish the necessary element of intent; misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. *Huntoon*, supra; *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). There is no evidence the claimant intentionally damaged the employer's property.

The claimant's and the employer's testimony is inconsistent. The administrative law judge finds the claimant's testimony to be more credible because he was an eye witnesses to the events for which he was terminated. The employer relied on circumstantial evidence to support its case. It did not consider that other employees may have driven the forklift.

DECISION:

The representative's November 29, 2016, 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