

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RANDY M WHALEN
Claimant

APPEAL NO. 09A-UI-14706-N

**ADMINISTRATIVE LAW JUDGE
DECISION**

FEDEX FREIGHT EAST INC
Employer

**Original Claim: 07/05/09
Claimant: Appellant (1)**

Section 96.5-2-a – Discharge
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Randy Whalen filed an appeal from a representative's decision dated August 5, 2009, reference 01, which denied benefits based upon his separation from FedEx Freight East, Inc. After due notice was issued, a hearing was held in Council Bluffs, Iowa, on November 19, 2009. Mr. Whalen appeared personally. The employer participated by Mr. Jason Quigley, regional human resource manager. Exhibits One, Two, Three, Nine, and Ten were received into evidence. Exhibits Four, Five, Six, Seven, and Eight were offered but not received.

ISSUE:

At issue in this matter is whether good cause has been shown for the claimant's failure to file a timely appeal and whether the claimant's discharge was for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Randy Whalen was employed by FedEx Freight East from August 26, 1996, until July 15, 2009, when he was discharged from employment. Mr. Whalen held the position of full-time city driver and was paid by the hour. His immediate supervisor was Mr. Rich Bennett.

Mr. Whalen attempted to file a timely appeal in this matter, believing that his appeal had been faxed by an area claims center on August 11, 2009. Subsequently, the claimant was informed that the facsimile had not been received by the Appeals Section and promptly re-appealed.

Mr. Whalen was discharged based upon the report of a company management individual who had observed his company truck and trailer in an unsecured condition at the Highway 30 dam site June 30. The management employee reported to the company that he had observed the tractor trailer at approximately 10:20 a.m. The employee was requested to later return and verify the tractor and trailer and did so approximately 20 minutes later, taking a camera phone picture of the trailer unit.

Because the report had been received from a management employee that Mr. Whalen's truck appeared to be parked for no apparent reason, Mr. Whalen was called to a meeting at the first opportunity on July 6, 2009. Mr. Whalen was asked to verify the times and locations that he had inputted on his electronic route sheet. After review, Mr. Whalen indicated that the times reported on June 30 were accurate. When told of the observation of the tractor trailer unit assigned to him at a location and time not reported on his route sheets, Mr. Whalen became upset but maintained that the information that he had provided to the company was accurate. Based upon the claimant's denial and the apparent discrepancy in the truck's location, the time it was not being operated for the benefit of the company, and the claimant's reported work activities, the employer believed that Mr. Whalen was being untruthful and further investigated. Based upon the amount of time that the claimant maintained that it took him to make four stops that morning, the identification of Mr. Whalen by the management individual, and the times between 10:09 a.m. and 11:05 a.m. on June 30 when the claimant was sent electronic communications to contact the office and did not do so, the employer reasonably concluded that Mr. Whalen had taken an unauthorized break, misreported his delivery activities, and had been untruthful in the investigation. A decision was then made to terminate Mr. Whalen from his employment.

It is the claimant's position that the allegations against him are contrived by the company because Mr. Whalen had previously had a workers' compensation claim related to a dental injury and because the employer had created a hostile work environment for him. The claimant had not been previously warned or counseled by the company.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record is sufficient to warrant the denial of unemployment insurance benefits. It is.

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 bears the burden of proof in this matter. See Iowa Code section 96.6-2. Misconduct must be substantial in order justify the denial of unemployment insurance 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 App. 1992).

In this case, the claimant was discharged after the employer reasonably concluded that the claimant had intentionally misrepresented his work activities on the morning of June 30, 2009, by taking an unauthorized break and failing to disclose his actual whereabouts and activities when questioned by the employer during an internal investigation.

Based upon a report by a management individual who observed Mr. Whalen's truck, the amount of time that had elapsed between delivery points, and the failure of the claimant to respond to electronic transmission sent to him by the company the period of time of the observation, the employer reasonably concluded that Mr. Whalen had not been truthful in his reports of his work activities or in his statements during the investigation.

The administrative law judge finds that the employer has sustained its burden of proof by a preponderance of the evidence. The administrative law judge gives little weight to the anonymous statements. The administrative law judge finds that the remaining evidence in the record is sufficient to corroborate the employer's belief and allegation that Mr. Whalen was not performing duties for the company during the time period in question as he represented on his log report or in the investigation of the matter. Benefits are withheld.

DECISION:

The representative's decision dated August 5, 2009, reference 01, is affirmed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw