

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANTONIO BRYAN
Claimant

APPEAL NO: 09A-UI-14588-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

SMITHWAY MOTOR XPRESS INC
Employer

OC: 08-23-09
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the September 25, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on October 27, 2009. The claimant participated in the hearing. Terri Pearson, Human Resources Manager, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time over-the-road truck driver for Smithway Motor Xpress from October 24, 2008 to November 14, 2008. The claimant worked for the employer for 21 days and delivered nine loads. The employer's witness testified he was late on five of the nine loads. The claimant disputes that number and stated he was late twice because of problems he had with Dispatcher Lori Bower. On November 4, 2008, the claimant was waiting in Covington, Kentucky, to receive an assignment from Ms. Bower. After waiting for quite awhile he sent her a Qual-Com message stating he was going inside a nearby mall to eat and she could call him on his cell phone if she had a load for him. He went inside and ate and when he returned to his truck he found a Qual-Com message from Ms. Bower sent approximately 30 minutes earlier, or five minutes after he left the truck, sending him on a load to Cincinnati. The claimant sent Ms. Bower a Qual-Com message asking why she did not call him on his cell phone and she said she was busy. The trip would normally take 30 minutes if traffic was not bad. He had to look up the location he was going to, find out how to get there and drive safely to his destination. As a result of Ms. Bower sending him the message by Qual-Com rather than calling him on his cell phone he was 10 to 15 minutes late and the company he was delivering to was closed. This occurred between 4:00 and 5:00 p.m. The claimant sent Ms. Bower a Qual-Com message informing her the business was closed when he arrived and she said, "You are late" and then told him she was issuing him a verbal warning and the next incident would result in further disciplinary action up to and including termination. The claimant called Tom Nelson in Human

Resources but he did not seem interested in the situation. The claimant's next load was scheduled from Cincinnati to Brownsburg, Indiana. He dropped it off and waited to be dispatched on his next trip. He received a Qual-Com message from Ms. Bower telling him to be patient and she would find a load for him. He waited all morning and then went to eat lunch in a truck stop. When he returned to his truck Ms. Bower sent him a Qual-Com message with just a phone number of the business he was to deliver on it. He asked Ms. Bower for an address and she told him to call the company. The claimant did so but did not receive an answer when he called. Ms. Bower could not provide the city, state, customer name or anything else. He continued to try to call the number Ms. Bower gave him but never received an answer. At the end of the day he sent a Qual-Com message saying it was a "wasted day" because he did not have enough information to make the delivery. The following morning Ms. Bower sent him a Qual-Com message asking if he received any more information and made the delivery and the claimant explained he did not and he was still in the same place he was the day before. Ms. Bower said that was the second load he was late on and "it seems like you aren't trying so I'm going to have to let you go." She instructed him to go to the Hammond terminal and leave his truck. The claimant testified he "was always accurate and took pride in being on time or early" to pick up or deliver a load so he could get more work.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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 proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000). While the employer's witness provided as much information as she had access to, she could not provide the five dates or details about when the claimant was alleged to have been late to pick up or deliver loads. The claimant credibly described two situations when he was late. On November 4, 2008, he was late because Ms. Bower did not call him on his cell phone as requested when he left his truck to get something to eat but instead sent him a Qual-Com message sending him on a load five minutes after he left his Qual-Com message and his truck. Ms. Bower also sent him a written warning for that incident because by the time he received the message and tried to make the delivery in Cincinnati the business he was delivering to was closed. His next load was delivered to Brownsburg, Indiana, in the morning. Ms. Bower told him to be patient and she would get him another load. Ms. Bower later sent him a Qual-Com message with only a phone number of the business he was supposed to deliver to that day. The claimant asked Ms. Bower for the address of the business she could not provide it to him. He attempted to call the phone number several times but did not get an answer. He asked Ms. Bower if she had the city, state or the customer's name but she did not. The claimant sent a message to Ms. Bower stating it was a "wasted day" because he did not have enough information to make the trip. When Ms. Bower asked the claimant the next day if he found the information he needed the claimant said no because he did not get any information required to make the trip so he was still in the same place. She stated that it was the second time he was late on a load and it seemed as if he was not trying so she was going to terminate his employment. Both of the incidents were the direct result of Ms. Bower's actions. It was not unreasonable for the claimant to ask her to call him on his cell phone when he went to eat November 4, 2008, and he was late for that delivery because he received the message late and consequently the business was closed when he arrived. It was also completely irresponsible for Ms. Bower, as a dispatcher, to assign the claimant a load and just give him a phone number for the company and not include an address, the city and the state where he was going. When the company did not answer and Ms. Bower did not provide further information the claimant had no choice but to wait until Ms. Bower obtained the required information. Instead she again blamed him for being late and terminated his employment. The evidence does not show that the claimant was to blame or did anything wrong in either situation. The employer has not met its burden of proving disqualifying job misconduct as defined by Iowa law. Therefore, benefits are allowed.

DECISION:

The September 25, 2009, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs