

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAVIER ADAME
Claimant

APPEAL NO. 06A-UI-09834-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FERGUSON ENTERPRISES INC
Employer

OC: 08/20/06 R: 03
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Ferguson Enterprises, Inc. (employer) appealed a representative's September 26, 2006 decision (reference 01) that concluded Javier Adame (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 23, 2006. The claimant participated in the hearing. Ted Simons appeared on the employer's behalf and presented testimony from one other witness, Debra Dange. During the hearing, Employer's Exhibits One through Five were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on July 11, 2005. He worked full time as a "man-up picker" in the employer's heating, cooling, and plumbing part distribution business; his primary responsibility was operating a reach or fork lift truck. His last day of work was August 18, 2006. The employer discharged him on that date. The reason asserted for the discharge was failing to have full control while operating the truck.

On August 18 Mr. Simons, the operations manager, observed the claimant backing the truck, facing backwards, with one hand on the throttle control and the other hand at least occasionally by his side rather than on the steering control stick. The claimant covered the area of about 50 yards; the speed of the truck was approximately five miles per hour. Since the claimant had not had both hands on the controls at all times while traveling, he was told this was a safety violation. The claimant had received a warning on November 23, 2005 for damage to product which fell off the back side of a rack when the claimant was putting a product on the rack, and he had received a warning on May 5, 2006 for damage to a product when the pallet he was moving caught on another pallet, and the product fell and broke.

The employer's testimony was that the claimant's hand was never on the steering control stick; the claimant's testimony was that his hand was occasionally off the stick but was periodically on the stick, and that it was implausible that his hand could have been off the stick the entire time as it was known that the truck was very sensitive to movement and could not have traveled as far as 50 yards without requiring some steering adjustment. The administrative law judge finds the claimant's testimony on this point to be more credible.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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 focus of the definition of misconduct is on acts or omissions by a claimant that “rise to the level of being deliberate, intentional or culpable.” Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer’s interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer’s interest, or
 2. The employee’s duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is not having both hands on the truck controls for the entire time he was operating the truck. Under the circumstances of this case, the claimant’s failure to keep his hand on the steering control at all times was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant’s actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative’s September 26, 2006 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw