IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

CLINT D SMITH
Claimant

O'REILLY AUTOMOTIVE INC
Employer

APPEAL NO. 18A-UI-11157-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/07/18
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

O'Reilly Automotive (employer) appealed a representative's November 8, 2018, decision (reference 02) that concluded Clint Smith (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for November 30, 2018. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer participated by Dan Mercer, Store Manager. Exhibit D-1 was received into evidence.

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 June 8, 2016, as a full-time hub delivery driver. The claimant signed for receipt of the employer's handbook on June 8, 2016. The handbook stated that an employee could not drive if he accumulated eighteen driving points. If the employer did not have other work, the employee could be terminated. Drivers would receive points for accidents, citations, and complaints. Employer vehicles displayed a telephone number encouraging other drivers to report grievances regarding the driver. The time period for accumulation of points is not listed in the handbook but the store manager believed it to be a twelve or eighteen month period.

Each time the claimant received a driving point, the store manager talked to him about watching his driving, paying attention, and following policies so the claimant would not accumulate any more points. The claimant thought the employer should install cameras on employer vehicles to help drivers defend themselves from false complaints. The employer thought it investigated sufficiently and cameras were too expensive.

The claimant received a citation for speeding and four driving points on October 28, 2016. On May 1, 2017, a caller complained that the claimant would not move over on the interstate and let

her merge from the ramp. The caller stated the claimant had sufficient room to move over. The employer assessed the claimant two driving points.

On July 14, 2017, the employer issued the claimant a verbal Progressive Discipline Form reminding him "to watch his driving so he doesn't get anymore call ins" (sic). The form listed complaints on May 1, 26, June 2, July 5, and 10, 2017. No driving points for those complaints or driving point total was listed on the form.

On September 27, 2017, the employer issued the claimant a Point Total Notice. The claimant acknowledged that his point total was fourteen. He understood that if it met or exceeded eighteen points, could not drive, and the employer did not have other work for him, he could be terminated.

On July 5, 2018, a caller said the claimant was speeding, had a cellphone at his head, and would not let the caller merge into the right lane. The claimant complained that he could not be expected to let someone merge if they do not have their signal on or if traffic is stopped on the interstate. The employer assessed the claimant four points.

On July 10, 2018, a caller said the claimant was swerving and the employer assessed the claimant four points. The claimant had said that things did not happen as the other driver described. He did not have any idea of some complaint.

On September 27, 2018, a caller said the claimant was tailgating. Someone threw their hands up and the claimant passed the caller at seventy miles per hour in a posted fifty-five mile per hour zone. The claimant told the employer he did not understand how he could be tailgating and going seventy miles per hour in a fifty-five mile per hour zone. The employer believed the caller and assessed the claimant four driver points.

On October 3, 2018, the store manager terminated the claimant for accumulating eighteen points between October 28, 2016, and September 27, 2018, about twenty-three months. The store manager would not have terminated the claimant had there been a position open in the company for him as a non-driver.

The claimant filed for unemployment insurance benefits with an effective date of October 7, 2018. The employer participated personally at the fact finding interview on November 6, 2018, by Dan Mercer.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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).

Iowa Admin. Code r.871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The store manager testified that the claimant was terminated for accumulating eighteen driving points in a twelve or eighteen month period. The employer demonstrated at the hearing that there is uncertainty in the driving point policy. It is difficult to enforce a policy with uncertainty. The claimant accumulated fourteen driving points in

the twelve or eighteen month period. The employer did not provide sufficient evidence that the claimant violated the employer's policy.

The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The employer was not able to provide sufficient evidence of a final incident of misconduct. The store manager did not have a statement from the September 27, 2018, caller or a statement from the employee who spoke with the caller. The claimant's statement raises legitimate questions about the caller's claims. These questions cannot be answered by anyone other than the caller or, perhaps, the person who took the complaint. A mere complaint is not sufficient evidence of wrong doing without proof to support the claim.

In addition, the store manager thought the claimant was a good employee and he would have kept him had there been another open position. The employer has failed to provide sufficient evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's November 8, 2018, decision (reference 02) is affirmed. 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