

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID M PRITCHARD
Claimant

APPEAL NO. 09A-UI-15039-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

RUAN TRANSPORT CORP
Employer

**Original Claim: 09/06/09
Claimant: Respondent (1)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 28, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 6, 2009. Claimant David Pritchard participated. Marshall Kraft, Terminal Manager, represented the employer. Exhibits One through Five and A. were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: David Pritchard was employed by Ruan Transport Corporation as a full-time truck driver from 2005 until September 4, 2009, when Marshall Kraft, Terminal Manager, discharged him from the employment for carelessness/negligence.

The final incident that triggered the discharge happened on September 4, 2009, when Mr. Pritchard delivered the wrong material to a customer. Mr. Pritchard delivered flyash instead of slag. At the point where Mr. Pritchard collected the load, the person who loaded the trailer loaded it with the wrong materials. Mr. Pritchard had paperwork for the load in his possession, which paperwork would have told him what he was carrying. Mr. Prichard failed to look at the paperwork either when he collected the load or before he unloaded the materials. Mr. Pritchard acknowledges that he should have looked at the paperwork before he emptied the load. Mr. Pritchard and other drivers were in the habit of cutting corners with deliveries and not checking the paperwork until after unloading had begun. But this practice was not authorized by the employer. Instead, the employer regularly reminded drivers of the need to check paperwork and check in with the customer before unloading material. Mr. Pritchard unloaded the flyash into a silo that was designated for slag.

In making the decision to discharge Mr. Pritchard from the employment, the employer considered prior incidents of carelessness/negligence. In May 2009, Mr. Pritchard went through

the prescribed steps to determine whether his trailer was empty of flyash before the trailer was loaded with powder cement. However, there was still flyash left in the trailer and the cement was loaded on top. The employer could not deliver the load and had to purchase the load. In October 2008, Mr. Pritchard collided with another vehicle as he was entering the driveway of a truck stop. As Mr. Pritchard was pulling into the drive, another motorist was pulling out of the drive in her car. Mr. Pritchard thought he had enough space to avoid the other motorist, but Mr. Pritchard misjudged the distance. This misjudgment and other others motorist's continued movement resulted in a collision. Neither motorist was cited. In May 2008, Mr. Pritchard delivered over a ton of cement to the wrong customer. The dispatcher gave Mr. Pritchard erroneous customer information and paperwork that contained the same erroneous information. When Mr. Pritchard arrived at the designated customer, he failed to check in with the customer before he started to unload. The customer contacted Ruan Transport to report it had not placed an order. Mr. Pritchard concedes that if he had checked in with the customer before unloading, the error would have been caught.

After Mr. Pritchard separated from the employment, he was diagnosed with adult attention deficit hyperactivity disorder (ADHD). Mr. Pritchard demonstrated the ability to satisfactorily perform his assigned duties despite this later diagnosis.

On March 17, 2009, Mr. Kraft observed Mr. Pritchard operate his truck in a careless manner when Mr. Pritchard elected to chat on his cell phone at the same time he operated his truck. Mr. Kraft was following Mr. Pritchard and Mr. Pritchard's carelessness resulted in rocks from the shoulder of the road being thrown up onto the vehicle Mr. Kraft was driving.

The employer counseled/reprimanded Mr. Pritchard in connection with the above matters. The written reprimand from May 2009 warned Mr. Pritchard that he faced discharge from the employment if he engaged in any further unsafe behavior.

REASONING AND CONCLUSIONS OF LAW:

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 proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment 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 Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

Mr. Pritchard was negligent in connection with the final incident on September 4, 2009, when he failed to check the paperwork or check in with the customer prior to unloading material. Regardless of the errors that had been made prior to Mr. Pritchard's handling of the load, the employer's paperwork review and check in process were designed to catch such errors. When Mr. Pritchard elected to omit these steps, he hindered detection of the error. The next most recent act of negligence and/or carelessness occurred on March 17, 2009, Mr. Pritchard carelessly operated the employer's truck when he elected to chat on his cell phone while he was operating his truck in traffic, wandered onto the shoulder, and sprayed Mr. Kraft's vehicle with rocks. The evidence fails to establish carelessness or negligence in connection with the May 2009 incident where cement was loaded into a trailer that contained flyash. Mr. Pritchard followed the prescribed steps to determine whether the trailer was empty of flyash and did not have another ready means of determining that the trailer was not empty.

In 2008, Mr. Pritchard was careless and/or negligent in 2008. In May 2008, Mr. Pritchard was negligent when he failed to check in with the customer before unloading material and unloaded at the wrong customer. Regardless of the errors that had been made prior to Mr. Pritchard's handling of the load, the employer's paperwork review and check in process were designed to catch such errors. When Mr. Pritchard elected to omit these steps, he hindered detection of the error.

In October 2008, Mr. Pritchard carelessly operated his truck when he misjudged the distance between his truck and another motorist while he turned into a truck stop driveway and collided with the other motorist's vehicle. The fact that a law enforcement officer concluded there was no prosecutable offense does not prove that Mr. Pritchard's actions were careful and safe. The weight of the evidence indicates that Mr. Pritchard contributed to the collision. At the very least, Mr. Pritchard's actions in that matter were careless.

The evidence fails to indicate that Mr. Pritchard's ADHD prevented him from performing his work duties in a safe, satisfactory manner.

The evidence establishes a five- to six-month lapse between the final incident and the next most recent incident. The evidence further indicates that each of the incidents was an isolated incident of ordinary negligence. Though there were multiple instances of negligence and/or negligence, they were not so recurrent as to indicate a willful and wanton disregard of the employer's interests. Accordingly, the administrative law judge concludes that Mr. Pritchard was not discharged for misconduct in connection with the employment that would disqualify him for unemployment insurance benefits. Mr. Pritchard is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

DECISION:

The Agency representative's September 28, 2009, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw