

BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

RICHARD R BOS

Claimant

and

COUNTRY MILE MAINTENANCE LLC

Employer

HEARING NUMBER: 19BUI-01489

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A

DECISION

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Claimant, Richard R. Bos, worked for Country Mile Maintenance, LLC from July 2, 2011 through January 26, 2019 as a full-time truck driver/garbage loader. His workday began at 6:00 a.m. The Employer trained the Claimant on company policy and provided him with specific route information. The Employer also gave the Claimant limited permission back in 2015 to pick up his excess garbage. (45:18; 55:55-56:40) Occasionally, the Claimant's truck broke down, which caused him to be late on his route. The Employer would receive customer complaints about the Claimant's failing to timely collect garbage. When this happened, the Employer talked to the Claimant about maintaining the route schedule.

The Employer received complaints from neighbors in Shellsburg, Iowa that a garbage truck woke them up several mornings at 5:30 a.m. The Employer was disbelieving because the Claimant's route was in Vinton County at that time. On December 13, 2018, the Employer investigated these complaints by waiting near the Claimant's home at 5:00 a.m. At 5:42, a company garbage truck did come to the Claimant's home wherein the Claimant got out and loaded his garbage onto the company truck. Sometimes the Claimant ran a few minutes late when he retrieved his garbage. The Employer

did not discipline the Claimant at this time.

On January 7, 2019, the Claimant became ill and was off work until January 26, 2019. While Mr. Bos was off work, the Employer took over his route. The Employer discovered the Claimant had been collecting garbage using a different route schedule, and the customers had gotten use to the Claimant's change of schedule in garbage collection. (27:00) When the Claimant was released to return to work on January 26, 2019, the Employer terminated Mr. Bos for theft and failing to follow the Employer's route schedules for the past four years.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665, (Iowa 2000) (quoting *Reigelsberger v. Employment Appeal Board*, 500 N.W.2d 64, 66 (Iowa 1993)).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. 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 NW2d 661 (Iowa 2000).

The Employer admitted first learning of the Claimant's collecting his own garbage on December 13, 2019. Yet, there is nothing in the record to establish that the Claimant was issued any verbal or written warning that his job was in jeopardy at that point. Although the Employer disputes that the Claimant was ever given permission to collect his own garbage at any time, the fact the Claimant was not disciplined on December 13th or at any time prior to his taking ill (early January 2019) for alleged theft makes it questionable that he was not given such permission.

871 IAC 24.32(4) provides:

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 the cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The Employer's discovery during January 2019 that Mr. Bos failed to maintain the appropriate garbage collection route for several year does not prove the Claimant didn't perform services to the customers as he was hired to do. It appears Mr. Bos performed his job to the best of his ability, even if it was according to his own route. As for the complaints about late garbage pick-up, the Claimant provided a plausible explanation for why that happened, i.e., occasional truck breakdown, which the Employer did not dispute. Based on this record, the Employer has failed to provide any specific dates, or specific instances that led to the Claimant's termination other than the December 13th incident, which was too remote in time to be considered a current act. And while the Claimant may have used poor judgement in modifying his route for which there was no evidence to establish harm to the Employer, this did not rise to the legal definition of misconduct. For this reason, we conclude the Employer has failed to satisfy his burden of proof.

DECISION:

The administrative law judge's decision dated March 6, 2019 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits provided he is otherwise eligible.

Kim D. Schmett

Ashley R. Koopmans
