IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BENJAMIN M WILSON
Claimant

ALLIED SERVICES LLC
Employer

APPEAL NO. 11A-UI-05714-NT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/27/11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Claimant filed a timely appeal from a representative's decision dated April 20, 2011, reference 01, which denied unemployment insurance benefits. After due notice, a telephone hearing was held on May 23, 2011. Claimant participated personally. Participating on behalf of the claimant was his attorney, Mr. Edward Cervantes. The employer participated by Mr. Lad Tucker, Operations Supervisor.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Benjamin Wilson was employed by Allied Services LLC from November 17, 2004 until March 25, 2011 when he was discharged from employment. Mr. Wilson normally worked as a full-time roll off truck driver. The claimant was employed full time and paid by the hour. His immediate supervisor was Lad Tucker, Operations Supervisor.

Mr. Wilson was discharged on March 25, 2011 based upon an incident that was reported to the company on March 16, 2011. At that time the claimant had been assigned to light duty for approximately two months due to a work injury. Mr. Wilson was assigned to work temporarily as a driver on a front loader refuge pickup truck as the duties did not conflict with his light-duty restrictions and the employer needed additional drivers that day. Mr. Wilson was assigned to work with another worker who would perform the duties of picking up the refuge at various stops.

The claimant was terminated based upon statements made by the coworker who alleged that the claimant had violated safety policies by reading a newspaper and texting while on the route. All employees had attended a mandatory safety meeting a few days before at which time the employer emphasized that "distracted driving" would be considered to be a serious work violation and would result in immediate discharge. Because the coworker had alleged that

Mr. Wilson had been reading a newspaper and texting “while driving” a decision was made to terminate Mr. Wilson from his employment without following the normal progressive discipline used by the company. The facility operations supervisor believed that Mr. Wilson had made incriminating statements when he questioned Mr. Wilson about his conduct on the route on March 16, 2011.

Although the employer was aware of the allegation and believed that Mr. Wilson had violated company policy, the claimant was allowed to continue to drive for approximately two additional days as drivers were needed. The claimant was subsequently discharged on March 25, 2011.

The company believed because Mr. Wilson was the “operator” of the vehicle any texting, reading the newspaper or other distractions while on duty constituted a dischargeable offense even if the vehicle was not moving. It is the employer’s position that the claimant should be “observing” the coworker when the vehicle was not moving and therefore the claimant was intentionally allowing himself to be distracted from his duties.

Company route drivers routinely use cell phones for business purposes while on refuge pick up routes. Drivers often text other drivers or management or contact them by cell phone to determine the location of pick ups or to answer other business questions.

On the day in question Mr. Wilson was using a cell phone to text for route pick up information from other employees. The claimant denies reading the newspaper. When questioned about his activities on March 16, 2011, Mr. Wilson asserted that the helper was the person who was reading the newspaper.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes sufficient misconduct to warrant the denial of unemployment insurance benefits. It does not.

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:
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> 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 insurance benefits. Misconduct serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance 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 a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

Allegations of misconduct without additional evidence shall not be sufficient to result in a 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).

In this matter Mr. Wilson was discharged based upon the employer's belief that had engaged in serious violations of the company's "distracted driving" policy. The employer believed based upon statements made by another individual that Mr. Wilson had been reading the newspaper and texting "while driving" and that this conduct not only clearly violated the company's policy but placed the coworker and others in danger. It is the employer's further position that texting or cell phone use in any manner is a violation of the policy even if the vehicle was parked. The evidence however establishes that drivers routinely use cell phones and text messages to obtain route information and that the use of these communication devices for these purposes was not only condoned but sanctioned by the employer.

Mr. Wilson appeared personally and provided first hand sworn testimony denying reading the newspaper, texting or using the cell phone while operating the company truck. The claimant testified that he used the cell phone and/or texting only to obtain route information and that he used the communication device only when it was safe to do so, when the vehicle was parked. The claimant was new to the route and needed to obtain route information to adequately perform his duties that day. Mr. Wilson denies making any admissions as to reading the newspaper when questioned about the matter and asserts that he identified the helper as the individual who was reading the newspaper. The employer elected not to discharge Mr. Wilson for the March 16, 2011 offense until approximately nine days later when it was convenient to do so.

Although hearsay evidence is admissible in administrative proceedings, it cannot be accorded the same weight as sworn, direct testimony. The administrative law judge finds the claimant's

testimony to be credible and not inherently improbable and therefore must accord more weight to the claimant's sworn, direct testimony in this matter.

The question before the administrative law judge in this case is not whether the employer has a right to discharge an employee for these reasons or for no reason whatsoever. The question is whether the discharge is disqualifying under the provision of the Employment Security Law. While the employer's decision to terminate Mr. Wilson may have been a sound decision from a management viewpoint, the administrative law judge must rule that the evidence is not sufficient to establish disqualifying misconduct and that the claimant was not discharged for a current act of misconduct on the date of his discharge, March 25, 2011. Benefits are allowed providing the claimant is otherwise eligible.

DECISION:

The representative's decision dated April 20, 2011, reference 01, is reversed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefit are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

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Terence P. Nice
Administrative Law Judge

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Decision Dated and Mailed

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