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

DANIEL W BOGGS
Claimant

APPEAL NO. 09A-UI-04528-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CRST VAN EXPEDITED INC
Employer

OC: 02/15/09
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 March 11, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 16, 2009. Claimant participated. Sandy Matt, Human Resources Specialist, represented the employer. Exhibits One and Two were received into evidence.

ISSUEs\S:

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

Whether the claimant was discharged for a "current act."

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Daniel Boggs was employed by CRST Van Expedited as a full-time over-the-road truck driver during two distinct periods. The first period of employment ended in January 2008. The most recent period of employment commenced on September 4, 2008 and ended on February 18, 2009, when Randy Kopecky, Safety Director, discharged Mr. Boggs from the employment. Kimberly Merta, Fleet Manager, was Mr. Boggs' immediate supervisor and was the person who notified Mr. Boggs of the discharge.

The final incident that prompted the discharge occurred on February 9, 2009, when Mr. Boggs received a warning citation for driving 57 m.p.h. in a 45 m.p.h. zone in Massachusetts. Mr. Boggs was operating the employer's truck on an interstate at the time and does not believe the reduced speed limit was properly posted. As a condition of receiving a warning rather than a regular citation, the Massachusetts's law enforcement officer directed Mr. Boggs to forward the citation to the employer, have them sign it, and return it to the proper authority in Massachusetts. Mr. Boggs put the document in the mail to the employer on or about February 9, 2009. The employer representative does not know when the employer received the warning citation. On February 18, Ms. Merta telephoned Mr. Boggs to tell him he was

discharged from the employment. This is the first time anyone from the employer had spoken to Mr. Boggs about the warning citation.

On September 12, 2008, Mr. Boggs was in the employer's truck with a co-driver. A motorist contacted the employer to complain about being cut off by the truck in connection with an illegal lane change. Mr. Boggs was not operating the truck at the time. The co-driver was operating the truck. Nonetheless, on October 8, 2008, Safety Director Randy Kopecky told Mr. Boggs he had been placed on a watch list, would have to undergo retraining, and would be discharged if there were any additional safety issues. Mr. Boggs underwent the retraining on October 16, 2008.

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).

The administrative law judge notes that the employer did not present testimony from Ms. Merta or from Mr. Kopecky. The employer had the ability to present such testimony. In addition, the employer failed to produce documentation to establish when the employer learned of the February 9, 2009 warning citation. The employer had the ability to present such evidence. The evidence in the record is insufficient to establish a "current act" of misconduct. See 871 IAC 24.32(8). Accordingly, the administrative law judge concludes that Mr. Boggs was discharged for no disqualifying reason. Mr. Boggs is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Boggs.

Even if the evidence had established a "current act," the evidence would fail to establish misconduct in connection with the employment that would disqualify Mr. Boggs for unemployment insurance benefits. The employer presented minimal evidence regarding the final incident that triggered the discharge and presented no evidence to rebut Mr. Boggs' assertion that the reduced speed limit was not properly posted. Such a situation as that described by Mr. Boggs would explain the issuance of a warning citation instead of a regular citation. In addition, the employer failed to present evidence to rebut Mr. Boggs assertion that he was not the person operating the employer's truck on September 12, 2008, when the motorist was allegedly cut off due to an illegal lane change.

DECISION:

The Agency representative's March 11, 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/css