IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MICHAEL D DESILVIO
Claimant

WEST SIDE TRANSPORT INC
Employer

APPEAL NO. 09A-UI-10970-LT

ADMINISTRATIVE LAW JUDGE DECISION

Original Claim: 06/28/09
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the July 29, 2009, reference 01, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on August 17, 2009. Claimant participated. Employer participated through Susan Smith, director of driver services. Tim Whitney and Lee Gino did not participate.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked full-time as an over-the-road driver since February 2006 and was separated on June 26, 2009. He was discharged because on June 24 he delivered a load late because the DOT put him out of service for not having his logs up to date. He was attempting to transition from a paper to electronic driver's log and was up to date between both of them. He explained that to the officer, who said it would be either a violation for multiple logs or out-of-date logs, so he produced his paper log. His electronic log only dated back to June 24 and it should have dated back eight days to June 18. His paper log did not show the Monday and Tuesday but the electronic log did. He delivered a load late on December 30, 2008 because he thought the load was to be delivered Marion, Ohio, when it was supposed to be delivered to Marion, Iowa. He was late delivering a load on July 28, 2008 after he misread the delivery date of July 27 on a load from Eau Claire, Wisconsin, to Chariton, Iowa. Employer's policy provides that three late deliveries in one year results in termination after warning. He was aware of the policy; but, the day before separation he was in his supervisor's office after having recovered a missing trailer, was offered a reward, and received a 250,000 safe mile award. He had no idea his job was in jeopardy. Driver Manager Strausberger allegedly placed him on a written warning on December 20, 2008, but employer does not have a copy of the warning and claimant did not receive a copy as is the normal procedure.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code § 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 establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy; but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs

potential liability for unemployment insurance benefits related to that separation. Although claimant had three late deliveries within one year, he was unable to determine if employer counted them against him, since there were no warnings or other notification his job was in jeopardy. Employer has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed.

DECISION:

The July 29, 2009, reference 01, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. The benefits withheld effective the week ending July 4, 2009 shall be paid to claimant forthwith.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/kjw