IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

NATHAN A RATH
Claimant

DAYTON FREIGHT LINES INC
Employer

APPEAL NO: 09A-UI-08241-ST

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/26//09
Employer: Respondent (2)

Section 96.5-2-a - Discharge
871 IAC 24.32(1) – Definition of Misconduct
Section 96.3-7 – Recovery of Overpayment

STATEMENT OF THE CASE:

The employer appealed a department decision dated May 28, 2009, reference 01, that held the claimant was not discharged for misconduct on April 24, 2009, and benefits are allowed. A telephone hearing was held on June 24, 2009. The claimant participated. Steve Rinaldi, Service Center Manager, participated for the employer. Employer Exhibit One, pages 1-8, was received as evidence. The claimant received the Employer's Exhibit prior to hearing, but he moved to suppress it as evidence. The motion was denied.

ISSUES:

Whether the claimant was discharged for misconduct in connection with employment.

Whether the claimant is overpaid benefits.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began full-time employment as a local delivery driver on September 19, 2007. T he claimant received an employee handbook that contains employer policy. The claimant last worked for the employer on April 24, 2009 when he was suspended, and then discharged on April 28 for having incurred five accidents within two years of employment.

The employer's safety department located in Dayton, Ohio reviews all employee accidents, and it makes the decision to discipline or terminate an employee. The claimant incurred employer recorded accidents on December 20, 21, 2007, June 28, 2008, April 6, and April 24, 2009. Although there is no written employer policy regarding discipline for employee accidents, Manager Rinaldi advised the claimant that the safety department may terminate an employee for three accidents.

When the claimant had a minor accident on April 6, Rinaldi counseled the claimant that he could be discharged for any further incident, and the claimant understood his job was in jeopardy. On April 24, the claimant T-boned an on-coming car with his vehicle when exiting a Menards store location. Although there was no moving violation cited by the police for this accident, the claimant was at fault and the employer determined it was preventable. The claimant was not cited in any of his accident history, but he did admit fault in the December 20 accident.

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 administrative law judge concludes the employer has established that the claimant was suspended on April 24, 2009, and discharged for misconduct in connection with employment on April 28 due to repeated driving accidents.

The claimant denied receiving any employer written accident policy and a safety department warning letter, and the employer failed to provide such documentation for the hearing. However, the employer documented the five accidents, and the claimant admitted he was at fault in at least two of the incidents, and knew his job was in jeopardy.

Safe driving is a standard of behavior that the employer has a right to expect. Repeated instances of ordinary carelessness after an individual is warned may constitute job disqualifying misconduct. Greene v. EAB, 426 NW 2d 659 (Iowa App. 1988). While the claimant may not

have received a written warning, he was verbally warned about his accidents on April 6 by Manager Rinaldi that would be a prudent person on notice that a further accident could mean discharge from employment. Less than three weeks later, the claimant incurred an at-fault accident that constitutes a current act of misconduct and warrants a discharge in light of his accident history.

Iowa Code section 96.3-7, as amended in 2008, provides:

> 7. Recovery of overpayment of benefits.
>
> a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
>
> b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.
>
> (2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Since the claimant has received benefits on his current claim, the overpayment issue is remanded for determination.

DECISION:

The department decision dated May 28, 2009, reference 01 is reversed. The claimant was discharged for misconduct on April 28, 2009. Benefits are denied until the claimant requalifies

by working in and being paid wages for insured work equal to ten times her weekly benefit amount, provided the claimant is otherwise eligible The overpayment issue is remanded.

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Randy L. Stephenson
Administrative Law Judge

_____
Decision Dated and Mailed

rls/css