

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JULIA LENYARD
Claimant

DES MOINES REGIONAL TRANSIT AUTHO
Employer

APPEAL 16A-UI-06798-DB-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 05/22/16
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the June 10, 2016, (reference 01) unemployment insurance decision that denied benefits based upon her discharge from employment for having too many accidents for which she was found at fault. The parties were properly notified of the hearing. A telephone hearing was held on July 6, 2016. The claimant, Julia Lenyard, participated personally. The employer, Des Moines Regional Transit Autho, did not participate.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as fixed route bus driver from October 1, 2012 until her employment ended on May 24, 2016. Claimant's job duties included driving the buses. Randy McKern was her immediate supervisor.

On May 23, 2016 claimant was driving the bus into the garage when she clipped the rear light. There was damage to the bus. The amount of damage was under \$200.00. Claimant had pulled into the garage driving the bus on multiple occasions but misjudged the spacing between the bus and the garage when she turned on that day.

The claimant was discharged from employment the following day by Mr. McKern. Claimant was told that she was being discharged because she had too many accidents. There was a written policy in place which stated that if you had a certain number of accidents then you could be subject to discharge. Claimant did not remember if the policy stated that if you reached 5 or 7 accidents you could be discharged.

Claimant received previous written discipline for other accidents she was involved in throughout her employment. In 2013 claimant hit the bus mirror on a sign. She did not see that the mirror was too close to the sign. She received a written discipline for this accident.

In 2014 claimant's bus was stopped on an incline. There was a large amount of snow on the ground and the bus began to slide on the incline. The bus slid into the rear of another vehicle. There was no damage to the bus but there was minor damage to the other vehicle. The other driver did not want to report the incident to the police and left the scene. Claimant received a written discipline for this incident.

In 2014 claimant was driving a 60 foot bus when she encountered mechanical issues. The rear doors locked causing the bus to skid into a fence on the employer's grounds. There was no damage to the bus. Claimant received a written discipline for this incident.

In 2014 claimant was driving the bus when another vehicle cut her off and turned in front of her causing her to hit the other vehicle. The vehicle stopped for a moment and then left the scene. Claimant reported this to the police. The other driver received a ticket from the police for his actions in causing the accident. The claimant received a written discipline for this incident. There was no damage to the bus from this incident.

In 2015 claimant was driving the bus and it was very windy. The wind caused the side panel of the bus to fly open and it hit a telephone pole. There was damage to the bus after this incident. Claimant received a written discipline for this incident. All of these incidents were accidents and claimant did not intentionally cause the incidents to occur.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason. Benefits are allowed.

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(4) provides:

(4) Report required. The claimant's statement and the 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 cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. 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 on such past act or acts. The termination of employment must be based on a current act.

Further, the employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. 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. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The employer did not present any witnesses or evidence. There was no evidence presented that any of the incidents were intentional or were caused by claimant's carelessness which indicated a wrongful intent.

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Further, poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

Two of the incidents the claimant was involved in were caused by the weather, namely the bus sliding in the snow and the panel being blown open by the wind. Another incident was caused by another driver and that driver was ticketed by the police. Another incident was caused by mechanical failure. The other two incidents were caused when claimant mistakenly misjudged the spacing between the mirror and the rear flasher on the bus. This type of behavior does not rise to the level of misconduct. 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 Bd.*, 616 N.W.2d 661 (Iowa 2000). There is no evidence that the claimant's actions had any wrongful intent.

Reoccurring acts of negligence by an employee would probably be described by most employers as in disregard of their interests. *Greenwell v Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. March 23, 2016). The misconduct legal standard requires more than reoccurring acts of negligence in disregard of the employer's interests. *Id.*

Further, a claimant's poor work performance does not disqualify her from receiving benefits. Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986).

The employer failed to meet its burden of proof in establishing disqualifying job misconduct. As such, benefits are allowed.

DECISION:

The June 10, 2016, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The benefits claimed and withheld shall be paid, provided she is otherwise eligible.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/pjs