

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JIMMY D MAXWELL
Claimant

APPEAL NO: 11A-UI-14223-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OZARK AUTOMOTIVE DISTRIBUTORS INC
Employer

**OC: 10/02/11
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct
871 IAC 24.32(8) – Current Act

STATEMENT OF THE CASE:

The claimant appealed a department decision dated October 21, 2011, reference 01, that held he was discharged for misconduct on September 13, 2011, and benefits are denied. A telephone hearing was held on November 29, 2011. The claimant participated. Whitney Smith Macintosh, HR Supervisor, participated for the employer. Employer Exhibit 1 was received as evidence.

ISSUE:

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

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 employment as a full-time route driver on April 8, 2008, and last worked for the employer on September 13, 2011. The claimant received an employee handbook that contained the policies of the employer. The employer policy is that a driver can be awarded points against his record for moving violations and at fault accidents, and 17 points is the threshold for suspension/termination.

The employer notified claimant he was awarded 4 points for a ticket on April 7, 2009, 5 points for backing into another company vehicle in a parking area on May 14, 2009, and 5 points for a jackknife accident with his vehicle on January 11, 2011.

During the early morning hours of September 10, 2011, a deer came into the roadway and struck claimant's tractor that caused him to drive off the roadway, striking a D.O.T. sign with damage exceeding \$5,000.00 to his vehicle and the sign. The employer practice was not to award points against a driver for accidents involving deer, but the employer concluded that claimant's driving response went beyond the normal incident and it awarded him 10 points. He was terminated on effective September 14, 2011 for 24 points in violation of the driving policy.

The employer had a practice of allowing drivers who had accumulated too many points to work in the warehouse, but it recently ended that alternative, and claimant was not offered continuing employment.

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.

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.

The administrative law judge concludes the employer has failed to establish claimant was discharged for a current act of misconduct in connection with employment on September 14, 2011, for violation of the company driving policy.

The Iowa Court of Appeals has ruled that it is not misconduct when a claimant has a deer accident that leads to non-insurability, because there is no willful violation. Fairfield Toyota, Inc. v. Bruegge, 449 NW2d 395 (Iowa App. 1985).

Claimant offered credible testimony that is corroborated by the written statement he gave to the employer that it was a deer striking his vehicle that caused the accident on September 10. The employer witness admitted that the employer practice was not to award points against an employee driver record for a deer accident. It did so because of the inability of claimant to control his vehicle and minimize the damages. The employer at fault accident conclusion and award of 10 points is also based on damage amount where there is no act of misconduct in claimant's driving conduct. Job disqualifying misconduct is not established due to a lack of any deliberate misconduct.

DECISION:

The department decision dated October 21, 2011, reference 01, is reversed. The claimant was not discharged for a current act of misconduct on September 14, 2011. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/css