IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JASON VERBESKI Claimant **SCHUSTER CO.** Employer	**DIA APPEAL NO. 21IWDUI2070** **IWD APPEAL NO. 21A-UI-07052** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 1/3/2021** **Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

On March 5, 2021, Jason Verbeski (claimant) filed a timely appeal from the March 2, 2021 unemployment insurance decision that found claimant was discharged for too many accidents for which he was found at fault.

A telephone hearing was held on April 27, 2021. The parties were properly notified of the hearing. The claimant participated personally. Schuster Co. (employer) participated by Krystin Sitzmann.

ISSUE(S):

Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant worked for employer Schuster Co. as a local shag driver. Claimant started with employer on December 18, 2019. Claimant was a fulltime employee who worked a set schedule and rotating Saturdays.

On December 31, 2020, claimant was backing up a truck when he hit non-employer equipment, causing damage. Claimant confirmed to company that he caused said damage. Claimant told employer that the truck was parked crooked and he neglected to get out and look behind the truck before backing out. Claimant was verbally terminated and separated from employment that day.

This follows several other preventable incidents where claimant was found to be at fault. On June 5, 2020, the claimant was backing up a truck and trying to hook onto a trailer. The claimant backed up too far and caused damage to the trailer. The claimant was given a verbal warning and written disciplinary action of losing his monthly bonus. At the hearing, the claimant claimed a bad fifth wheel contributed to the accident however there is no log of such a problem or a repair order for the truck's fifth wheel.

On June 23, 2020, the claimant was involved in another backing incident. Claimant forgot to latch doors when he backed into dock and broke off trailer door hinges. The claimant was given a verbal warning and written disciplinary action of losing his monthly bonus.

On August 17, 2020, the claimant was making a left turn trying to park a trailer. The claimant had a door open and misjudged a turn causing damage to the driver side of the trailer. The claimant was given a verbal warning and written disciplinary action of losing his monthly bonus.

On September 14, 2020, the claimant was driving an employer semi-truck on a public roadway and entered the lane of another motorist and sideswiped her. Police were not ultimately called, claimant citing that he did not want the DOT points that could have resulted. Claimant admits he entered the motorist's lane but contends the motorist's driving contributed to the accident. The claimant was given a verbal warning and written disciplinary action of losing his monthly bonus.

As a result of the accidents, employer assigned claimant several remedial trainings. Specifically, claimant was assigned backing training on June 9, 2020. Claimant was assigned space training on June 23, 2020, August 17, 2020, and September 15, 2020. Claimant was notified of the trainings through his personal email and a message sent via Qualcomm to the specific truck claimant was operating. Claimant did not complete any of the assigned training. However, employer also did not ensure the training was ever completed either. Claimant maintained he was not aware any remedial training was assigned to him. However, the training assignments were sent to his personal email, he should have received and completed them.

In the employer handbook, punishment including termination is appropriate for issues such as gross negligence, careless errors, violation of safety practices, and lane change accidents. The handbook requires truck drivers to look at the space behind the truck and trailer before backing.

Claimant applied for unemployment insurance benefits. The fact-finder concluded he was discharged for having too many at fault accidents and was therefore ineligible for benefits. Claimant filed a timely appeal.

On appeal, the claimant stated that prior to this employment, he had no experience as a shag driver. However, he believes he has gone above and beyond the call of service by routinely volunteering to take other driver's unwanted Saturday shifts. The claimant believes that because he drives more than his colleagues, it should not surprising that he is involved in several more accidents than they are. Out of the five accidents the claimant was involved in during his last six month of employment, he does take issue with two of them as mentioned above. Claimant denies recalling being warned more than once for these incidents. However, he does acknowledge that his bonuses were taken away in several months and claims that he just "assumed" it was due to a company policy regarding damage to company property.

REASONING AND CONCLUSIONS OF LAW:

For the reasons set forth below, the March 2, 2021 unemployment insurance decision that found claimant is ineligible is affirmed.

Employees discharged for misconduct are not eligible for unemployment insurance benefits. Iowa Code § 96.5(2)(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.

Iowa Admin. Code r. 871-24.32. Conduct asserted to be disqualifying misconduct must be both specific and current. *West v. Emp't Appeal Bd.*, 489 N.W.2d 731, 734 (Iowa 1992); *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659, 662 (Iowa Ct. 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." *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. The employer has the burden of proof in this matter. See Iowa Code section 96.6(2); *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

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).

This is both a hard and close case. The line between incompetence deserving of termination and misconduct warranting denial of benefits is not always bright. Here, there are both aggravating and mitigating considerations. First, claimant does not appear to have an extensive amount of experience or training working as a shag driver. In fact, at the time of his termination, he only had just over one year of experience.

However, five accidents in six months is a very troublesome pattern. One would hope after one or two workplace accidents that a worker would proceed with much more caution, especially considering several incidents, including the final act, involved issues with unsafe backing. Employer is rightly concerned that property damage not only included their own implements but that of customers and a random motorist. The company also cited a safety issue for the claimant, other employees, and the public at large with claimant being involved in so many accidents.

This judge was disappointed that claimant minimized the accident where he changed lanes and sideswiped a motorist. Claimant tried to share blame with the motorist and claimed it only resulted in "a very minor scratch." First, entering the lane of another vehicle is almost always exclusively the fault of the person who entered the other lane. Especially, when the claimant is operating a machine that can weigh tens of thousands of pounds, it is a major safety issue for a truck not to ensure it is safe to change lanes. Changing lanes without ensuring it is safe first is a definite breach of the level or care owed by an employee to the employer.

The claimant was rightfully assigned additional training on backing and space management. However, claimant did not complete such training. Claimant both claimed he never received notice of the trainings and that his supervisor told him he could ignore certain emails and

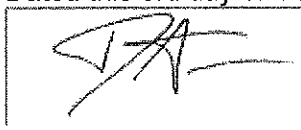
messages. First, the training were sent to both the specific truck the claimant was operating and his personal email. The claimant's denials of receiving such are not credible. What is more likely is that the claimant ignored certain training assignments. However, the employer needs to ensure that when remedial training is assigned, it is completed. It cannot be only on the employee to complete training. Similarly, this judge does not find claimant's assertion that he was only warned once for the four prior accidents credible. This judge is confident that claimant was warned after each incident.

In the end, while close, claimant's actions constituted misconduct because of the recurrent and careless nature of his incidents. If there were only one or two workplace accidents, that may be a different story. However, causing five preventable accidents in six months rises to the level of misconduct. The claimant had a duty to his employer to be more careful. While the claimant did not intentionally cause any of the accidents, failing to follow company policies regarding safety and operation of the truck five times shows a level of carelessness that constitutes misconduct. This judge has no doubt regarding the devotion and dedication claimant had to this job. However, his recurrent carelessness and negligence that resulted in five preventable damage causing accidents is misconduct warranting denial of benefits. As such, the initial decision denying benefits must be affirmed.

DECISION:

The March 2, 2021 unemployment insurance decision is AFFIRMED. Claimant is not eligible to receive benefits.

Dated this 3rd day of May, 2021.



Thomas J. Augustine
Administrative Law Judge

Note to Claimant: This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision. Individuals who do not qualify for regular unemployment insurance benefits due to disqualifying separations, but who are currently unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** Additional information on how to apply for PUA can be found at https://www.iowaworkforcedevelopment.gov/pua-information.