

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WILLIAM S ALLEN

Claimant

APPEAL NO. 14A-UI-05641-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DECKER TRUCK LINE INC

Employer

OC: 04/27/14

Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

William Allen filed a timely appeal from the May 19, 2014, reference 01, decision that disqualified him for benefits. After due notice was issued, a hearing was held on June 24, 2014. Mr. Allen participated personally and was represented by attorney Romina Ben-Elyaho. Courtney Bachel represented the employer and presented additional testimony through Andrea Klobberdanz. The administrative law judge took official notice of the documented submitted for and generated in connection with the fact-finding interview and received Exhibit 15 into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: William Allen was employed by Decker Truck Line, Inc., as a full-time over-the-road commercial truck driver from October 2012 until October 25, 2013, when Brenda McNealey, Vice-President of Human Resources discharged him from the employment for alleged violation of company policy, alleged violation of Federal Motor Carrier Safety Violations, alleged falsification of his employment application, and alleged falsification of his federal Department of Transportation medical certification.

On October 22, 2012, the employer provided Mr. Allen with written materials that included the employer's personnel policies and the Federal Motor Carrier Safety Regulations (FMCSR). Mr. Allen provided written acknowledgement of receipt those materials. Mr. Allen understood that his work as a commercial truck driver subjected him to the requirements set forth in the FMCSR.

On October 23, 2012, Mr. Allen completed the driver portion of a Medical Examination Report for Commercial Driver Fitness Determination. Mr. Allen indicated on the form that he suffered from diabetes that was controlled by diet and pills. Mr. Allen provided the name and address of

his treating physician. Mr. Allen indicated on the form that his diabetes was treated by twice daily 1,000mg doses of the oral medication Metformin. Mr. Allen signed the form to certify that the information he had provided was complete and true and to indicate that he understood that inaccurate, false or missing information may invalidate the examination and his Medical Examiner's Certificate. The Medical Examiner noted on the form that the Medical Examiner had reviewed Mr. Allen's stated medical history. The form identified Dr. Paula Colledge as the physician involved in the examination.

On October 3, 2013, Mr. Allen completed the driver portion of another Medical Examination Report for Commercial Driver Fitness Determination. Mr. Allen again indicated that he suffered from Type II diabetes that was controlled through diet and oral medication. Mr. Allen signed the form to certify "under penalty of perjury under the laws of the State of California that the foregoing is true and correct" and that he understood "that inaccurate, false or missing information may invalidate the examination and [the] Medical Examiner's Certification. Charlene Lewis Richardson, Advanced Practice Registered Nurse, of Treasure State Occupational Health in Missoula, Montana conducted the medical exam on October 3, 2013. Ms. Lewis Richardson made multiple findings concerning Mr. Allen's physical condition and concluded that he met the FMCSR physical standards to be eligible to operate a commercial motor vehicle. Ms. Lewis Richardson noted that Mr. Allen's diabetes subjected him to annual medical evaluations to recertify that he was eligible to operate a commercial motor vehicle.

On October 25, 2013, Mr. Allen's assigned truck was in the repair shop at the employer's Missoula, Montana terminal. At that time, the employer located a large quantity of insulin "pens," individual doses of injectable insulin, in the cab of Mr. Allen's truck. Mr. Allen had belonged to Mr. Allen's recently deceased father. Mr. Allen had transported the injectable insulin from his mother's home in California to Montana and had been in possession of the injectable insulin for several days.

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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

Mr. Allen had provided a highly implausible explanation regarding why the large quantity of injectable insulin was in his possession in the employer's vehicle for several days and over great distance. The presence of the insulin in the cab's refrigerator and in Mr. Allen's duffel bag, the duration of the possession, the distance Mr. Allen had traveled with the items in his possession, and his status as a diabetic, altogether are strong circumstantial evidence that Mr. Allen was using the insulin pens to self-medicate, regardless of whether the employer found a used insulin pen in the cab. Use of another's prescription medication is indeed a criminal offense in the state of Iowa and presumably in other states as well. In any event, use of the injectable insulin while operating a commercial motor vehicle would indeed be in violation of the U.S. Department of Transportation regulations. The weight of the evidence indicates that Mr. Allen was knowingly violating those regulations. The evidence in the record is insufficient to establish that Mr. Allen had falsified his D.O.T. physical information weeks earlier or that he had falsified documentation earlier in the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Allen was discharged for misconduct. Accordingly, Mr. Allen is disqualified for benefits until he has worked in and been paid wages for insured work equal to

ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits.

DECISION:

The claims deputy's May 19, 2014, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css