IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

WARE, KEVIN, T
he Claimant

WEST SIDE TRANSPORT INC
Employer

APPEAL NO. 09A-UI-17016-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/18/09
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 4, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 16, 2009. Claimant Kevin Ware participated. Susan Smith, Director of Drivers, represented the employer. The administrative law judge took official notice of the documents submitted for or generated in connection with the fact-finding interview. Exhibits One, Two, and A were received 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: Kevin Ware was employed by West Side Transport, Inc., as a full-time over-the-road truck driver from March 2006 until October 6, 2009, when Tim Whitney, Director of Safety, discharged him from the employment. The incident that ultimately prompted the discharge, and that prompted a suspension effective September 17, 2009, occurred on September 17, 2009. Mr. Ware was operating the employer's tractor-trailer during rush hour traffic in Maryland. Mr. Ware entered the busy highway via an access road/merge lane. At the point where the merge lane was about to end, Mr. Ware realized he would have to speed up to enter the flow of traffic ahead of the vehicle next to him. Mr. Ware accelerated on the wet pavement and lost control of the tractor-trailer. The tractor-trailer traveled across the lanes of traffic and ended up lodged on the cement median/barrier, with the tractor cab projecting over into a lane meant for oncoming traffic. The accident resulted in the highway being closed while the authorities summoned a towing service to remove the truck. The state of Maryland billed the employer for the towing service and the damage to the concrete barrier. The truck suffered substantial damage. Law enforcement issued a citation to Mr. Ware for "Negligent driving vehicle in careless and imprudent manner endangering properly, life and person." The charge carried a $140.00 fine.

Within ten minutes of the accident, Mr. Ware notified Tim Whitney, Director of Safety, of the accident. Mr. Ware told Mr. Whitney that he had just topped a hill and was starting down the other side when the gears jumped, he lost control, and the truck hit the wall twice. Mr. Whitney sent Mr. Ware home to Alabama while the employer awaited receipt of a police report concerning the incident. Mr. Whitney instructed Mr. Ware to find a way to a hospital for a drug test, to get a hotel room for the night, and to call Mr. Whitney the next morning. Mr. Whitney told Mr. Ware he was suspended until Mr. Whitney got more information on the accident, at which time Mr. Whitney would make definitive decision about Mr. Ware's continued employment. Mr. Whitney told Mr. Ware that while the employer waited for additional information regarding the accident, Mr. Ware had three options. He had the option of staying in Maryland at his own expense, going home to Alabama, or going to Cedar Rapids and staying at his own expense. Mr. Ware elected the least costly option, which was to go home and wait for further news from the employer. The drug test result was negative.

Mr. Ware continued to be in daily contact with Mr. Whitney during the period of suspension. On October 1 or 2, Mr. Whitney notified Mr. Ware that he had received the drug test result, the law enforcement accident report, and the engine reading that would indicate Mr. Ware's speed, braking, and so forth at the time of the accident. Mr. Whitney told Mr. Ware that he would be allowed to return to the employment, but would have to travel to Cedar Rapids to take the employer's defensive driving course. Mr. Whitney told Mr. Ware that if he had any further complaints about Mr. Ware, or if Mr. Ware were in any further accidents, that he would face discharge at some future point.

On October 5, Mr. Ware took the employer's defensive driving course and met with Mr. Whitney to discuss the accident. Mr. Whitney expressed concern that the law enforcement accident report contained information that Mr. Ware had mentioned to Mr. Whitney when he spoke to him on September 17. The accident report contained the following narrative:

> Vehicle #1 (Truck Tractor, Pulling Semi-Trailer) was traveling W/B.... Vehicle #1 lost control on the wet roadway, and traveled off the left side of the road. Once off the left side of the road, Vehicle #1 struck the concrete barrier wall. Vehicle #1 became stuck on the concrete wall. The front of the tractor was half way out into E/B I-68 lane #1. The wall sustained heavy damage in several locations, causing roadway closure.
>
> No other state property was damaged.

The accident report information that concerned Mr. Whitney was the statement attributed to Mr. Ware:

> Mr. Ware stated he was traveling in the merge lane coming up to the hill W/B prior to Vocke Rd. He advised the lane he was in was getting ready to end, so he needed to move over. He said there was another tractor and trailer alongside him, so he sped up to get ahead of the other truck. He said when he cleared the truck and attempted to move over, he lost control.

Mr. Whitney prepared a Conference Report/reprimand that indicated Mr. Ware had been suspended and would undergo retraining and a "check ride." The reprimand indicated that "any future preventable collision or conviction of the careless driving charge from collision, reports of unsafe driving subject Kevin to discharge." After that, Mr. Whitney accompanied Mr. Ware on a "road test." During the road test, Mr. Ware failed to come to a complete stop at a red light. Mr. Whitney also observed that Mr. Ware followed one or more vehicles with just a two-second interval between the vehicles, rather than an eight-second interval the employer expected.

Mr. Whitney pointed out the rolling stop and the close following of the vehicle. Mr. Ware explained that the employer's eight-second following rule would not work in rush-hour traffic.

On October 6, Mr. Whitney discharged Mr. Ware from the employment. Mr. Whitney cited his concern that the employer's insurance carrier might not—at some future point--be willing to cover Mr. Ware's operation of the employer's vehicles.

In making the decision to discharge Mr. Ware from the employment, the employer considered other matters. In March 2008, Mr. Ware retaliated against another semi-truck driver who had cut him off by throwing a soft-drink container at the other driver's truck. The other driver turned out to be a student driver. In April 2006, Mr. Ware was cited by law enforcement for improper lane change, disobeying a solid white lane dividing line and speeding 63 m.p.h. in a 55 m.p.h. speed zone. It is unclear from the Driver/Vehicle Examination Report whether Mr. Ware was convicted of any of the alleged violations.

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 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).

The weight of the evidence in the record fails to establish that Mr. Ware intentionally misrepresented the September 17, 2009 accident to employer at the time he reported the matter to the employer ten minutes after it occurred. The accident had just occurred and had been significant. Mr. Ware was still in the midst of addressing the issue. Under the circumstances, a reasonable person would not expect Mr. Ware to be able to give an exhaustive description—during a phone call--of what had just occurred. Given that law enforcement officers are specifically trained to elicit information during witness interviews, a reasonable person would expect that additional details might come out as the result of a law enforcement officer's interview of Mr. Ware. The employer failed to present testimony from Mr. Whitney regarding what exactly Mr. Ware said. The weight of the evidence fails to indicate a willful, or event negligent, misrepresentation of the facts surrounding the accident.

The weight of the evidence indicates that Mr. Ware's operation of the semi-truck is what caused the accident. In that respect, Mr. Ware's operation of the truck was careless—regardless of the ultimate resolution of the citation for careless driving. However, there were also mitigating circumstances. These included the wet pavement, the rush-hour traffic, and the fact that Mr. Ware's lane was coming to an end and he had to choose between making his way into the flow of traffic as best he could or stopping at the end of the entrance, which would have made it more difficult for him and others behind him to enter the flow of traffic.

The weight of the evidence indicates that Mr. Ware was careless in failing to come to a complete stop at the traffic device during the road test on October 5, 2009. The evidence fails to establish carelessness with regard to the space between Mr. Ware and the vehicle ahead of him during the driving test.

The weight of the evidence fails to establish any intentional misconduct, negligence or carelessness with regard to the April 2006 Driver/Vehicle Examination Report. The relevant evidence establishes there were citations issued, but nothing more.

The weight of the evidence establishes willful misconduct in March 2008 with the throwing of the soft-drink container at the other vehicle. But this incident did not constitute a current act of willful or wanton disregard of the employer's interests at the time Mr. Ware's employment came to an end a year and a half later.

Though the evidence establishes some amount of recurring carelessness, the carelessness/negligence is not so recurrent as to indicate a willful and/or wanton disregard of the employer's interests. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Ware was discharged for no disqualifying reason. Accordingly, Mr. Ware is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Ware.

DECISION:

The Agency representative's November 4, 2009, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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