

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PATRICK H HOLLARS
Claimant

APPEAL NO. 11A-UI-08826 -VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALLIED SERVICES LLC
Employer

**OC:06/05/11
Claimant: Appellant (2)**

Section 96.5-2-a -- Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a decision of a representative dated June 28, 2011, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on August 11, 2011, in Davenport, Iowa. Claimant participated. The employer failed to participate in the hearing. The record consists of the testimony of Patrick Hollars and Claimant's Exhibits A and B.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness and having considered all of the evidence in the record, makes the following findings of fact:

The employer is in the business of garbage pickup and waste disposal. The claimant was hired in August of 1998. His last day of work was May 27, 2011. He was terminated on May 27, 2011. He was a full time roll-off driver at the time of his termination.

The incident that led to the claimant's termination occurred on May 27, 2011. The claimant was assigned to pick up a container at a construction site. The claimant was able to load the container and drive the truck without difficulty. Normally an overweight load will tip the front end of the truck up or the truck will not load the container. Neither of these things happened when the claimant picked up the load. When the claimant reached the landfill, the truck was weighed. The load was overweight. The claimant followed company procedures and reported the overweight load to the dispatcher. When the claimant returned to employer's place of business, he was terminated for hauling too heavy a load. The claimant had never received any prior warnings for hauling overweight loads.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. The legal definition of misconduct specifically excludes errors of judgment or discretion in isolated situations. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8) See also Greene v. EAB, 426 N.W. 2d 659 (Iowa App. 1988) The employer has the burden of proof to establish misconduct.

There is insufficient evidence in this record that the claimant was discharged for a current act of misconduct. The claimant testified that he did not know that the load was overweight until he

reached the landfill and the load was weighed. The claimant has no way of knowing the weight of a load because the truck he was driving does not have any device or instrument to weigh the load. There is a general rule that if the truck end comes up or the truck is difficult to drive that the load might be overweight. Neither of those things happened in this case. The claimant followed procedure and reported the overweight load to the employer as soon as he found out. The claimant was then terminated for driving an overweight load.

There was no employer participation in this hearing and therefore no evidence of misconduct. The claimant was terminated, according to the employer's own corrective action report, for using "poor judgment." Poor judgment in a single situation is not misconduct. Since the employer has not shown misconduct, benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated June 28, 2011, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs