

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HUBERTO PLUMEY
Claimant

APPEAL NO. 09A-UI-10281-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

CRST VAN EXPEDITED INC
Employer

OC: 05/31/09
Claimant: Respondent (1)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated July 10, 2009, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on August 4, 2009. Claimant participated. Employer participated by Sandy Matt, human resources specialist, and Charm White, fleet manager. The record consists of the testimony of Sandy Matt; the testimony of Charm White; the testimony of Huberto Plumey; and Employer's Exhibits 1-2.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

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

The claimant was hired as a full-time over-the-road trucker on December 13, 2007. The claimant was terminated on June 3, 2009. He was terminated because the employer obtained information that the claimant had his wife in the truck, which was contrary to company policy. The claimant had been training drivers for the employer and the information that the claimant had his wife in the truck came from these former students. The claimant denied that his wife ever rode in the truck with him.

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.

Misconduct is found in deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. The employer has the burden of proof to show misconduct. In this case, the claimant was discharged because the employer received information that the claimant had his wife in the truck, which was contrary to company policy. The claimant testified at the hearing that his wife was not in the truck and that the employer's information came from a disgruntled student of the claimant. Charm White, the claimant's supervisor, testified that the claimant admitted that his wife was in the truck. The claimant also denied telling Ms. White that his wife was in the truck.

The employer did not produce the students who supposedly witnessed the claimant's wife in the truck, even though those witnesses were available to testify. When misconduct is alleged by the employer, there must be credible evidence. Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs. Iowa Code section 17A.14(1). The hearsay evidence from the claimant's students was adamantly denied by the claimant. Because of the nature of the evidence produced at hearing, the employer is unable to show misconduct.

Allegations of misconduct 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 Iowa Court of Appeals set forth a methodology for making the determination as to whether hearsay rises to the level of substantial evidence. In Schmitz v. Iowa Department of Human Services, 461 N.W. 2d 603, 607-608 (Iowa App. 1990), the Court requires evaluation of the "quality and quantity of the [hearsay] evidence to see whether it rises to the necessary levels of

trustworthiness, credibility and accuracy required by a reasonably prudent person in the conduct of their affairs." To perform this evaluation, the Court developed a five-point test, requiring agencies to employ a "common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better evidence; (4) the need for precision; (5) the administrative policy to be fulfilled." Id. at 608.

The evidence of the employer in this case is a recitation of what two or perhaps three individuals told Ms. White about the claimant's wife being in the truck. These two individuals did not testify and it is impossible, therefore, to assess their credibility. Since the claimant's termination was based in part on what these individuals told the employer, their testimony was critical to the employer proving its case. Accordingly, the employer has failed to sustain its burden of proof. Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated July 10, 2009, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs