IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

SABAHUDIN SABIC Claimant **TRANSERVICE LOGISTICS INC** Employer	**APPEAL 17A-UI-03915-DL** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/26/17** **Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed an appeal from the March 29, 2017, (reference 01) unemployment insurance decision that allowed benefits based upon a discharge from employment. After due notice was issued, a hearing was held on May 26, 2017, in Des Moines, Iowa. Claimant participated and was represented by Katie Ervin Carlson, Attorney at Law. Claimant's spouse Sherzada Sabic observed. Employer participated through general manager Kenneth Presson and manager Cory Sass. Claimant's Exhibits 1 through 3 were received.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time professional livestock truck driver from November 29, 2016, through February 10, 2017, when he was discharged during his probationary period. On February 8 at about 11 a.m. claimant was training a new driver Travis Flahtery in the morning. They met DeLong at a truck wash in Ames to switch trainees so that Flahtery would go with DeLong and trainee driver John Riggs would spend the afternoon with claimant. Sass had approved the arrangement in advance. Riggs was in the truck with claimant and DeLong was on the step of the driver's side door. DeLong disagreed so claimant told him to talk to Sass. DeLong became upset, slammed the truck door and gestured with his middle finger. Claimant returned the gesture. Travis was in the other truck waiting for DeLong and did not see anything. Claimant called Sass to set up an appointment for February 9 after work to let him know what happened between them. Sass agreed because they were both good leaders and workers. DeLong and claimant texted later in the day about something work-related but there was no ongoing problem. Later in the afternoon, Riggs was not cooperating with claimant's training so claimant told him he could ride with another driver or pay attention. Riggs suddenly asked claimant, "why are all Muslims killers," "why are Muslims allowed to have four wives?" and "why do Muslims hate Christians?" Claimant, who is Muslim, told Riggs to stop or he would notify Sass. DeLong and Riggs did not participate in the hearing. At the meeting with Sass on February 9, claimant also told him what Riggs had said. Sass told him it would not be tolerated. Claimant asked if he was doing a bad job or if he would be fired. Sass told him, "I'm not going to fire you; you're doing a good job."

The evening of February 9, Sass sent claimant and Riggs an e-mail explaining his disappointment at their inappropriate hand gestures in the presence of trainees, lack of professionalism and attitudes, and warned them that any further unprofessionalism or general misconduct would result in their termination from employment. (Claimant's Exhibit 1) Nothing was mentioned about Riggs. Sass has the authority to hire and fire but called Presson at the Fort Wayne, Indiana, office the morning of February 10 while claimant was on an early route assignment to Missouri. They decided to fire claimant and DeLong because of the hand-gesture interaction on February 8. Presson knew about the e-mail Sass had sent claimant and DeLong the night before. Before he could be told he was going to be discharged, DeLong quit the employment. Sass called claimant to tell him of his discharge when he was about 45 minutes from his return to the terminal. No alleged incidents of misconduct occurred between when the e-mail was sent the evening of February 9 and when claimant was discharged. Sass explained to Riggs the employer's policy about discrimination but noted the counseling was not considered disciplinary. (Claimant's Exhibit 3) Claimant had no prior related discipline. The claimant's comment to Sass about taking matters into his own hands by seeking a lawyer's advice and filing an unemployment insurance benefit claim occurred after the notice of discharge and is not considered here as it was not a reason for the separation when the decision was made or claimant was notified.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code section 96.5(2)a provides:

> **Causes for disqualification.**
> 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. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

Whether an employee violated an employer's policies is a different issue from whether the employee is disqualified for misconduct for purposes of unemployment insurance benefits. *See*

Lee v. Emp't Appeal Bd., 616 N.W.2d 661, 665 (Iowa 2000) ("Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." (Quoting *Reigelsberger*, 500 N.W.2d at 66.)).

Iowa Admin. Code r. 871-24.32(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.

Inasmuch as the employer had warned claimant about the final incident the evening of February 9, and there were no incidents of alleged misconduct thereafter, it has not met the burden of proof to establish that claimant acted deliberately or negligently after the most recent warning. Thus, the employer has not established a current or final act of misconduct.

Furthermore, although the claimant did acknowledge engaging in the exchange of an unprofessional hand gesture with DeLong, it was merely an isolated incident of poor judgment and inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. A warning for attendance is not similar to a complaint of unprofessional behavior and an employer's simple accrual of a certain number of warnings counting towards discharge does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits.

Finally, even though the claimant may have behaved unprofessionally by exchanging hand gestures with a coworker, since the discharge without prior warning consequence was more severe than Riggs received for verbal taunts about claimant's religion, also an issue of unprofessionalism at minimum, the disparate application of the professionalism policy cannot support a disqualification from benefits.

DECISION:

The March 29, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/rvs