

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEFFREY E PEGG
Claimant

APPEAL NO. 13A-UI-00481-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ADM TRUCKING INC
Employer

**OC: 12/09/12
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 January 4, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 21, 2013. Claimant Jeffrey Pegg participated. Lee Knetter represented the employer and presented additional testimony through Dave Michael. Exhibits One through Four, 15, 22 through 26, and 28 through 35 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: Jeffrey Pegg was employed by ADM Trucking, Inc., as a full-time commercial truck driver from 2001 until December 4, 2012, when Lee Knetter, Manager of the ADM Transportation in Des Moines, discharged him from the employment for alleged negligence.

The final incident that triggered the discharge occurred on December 3, 2012. On that day, as Mr. Pegg was returning from delivering a tank of waste water to the Des Moines Waste Water Treatment Facility, the empty water tank trailer Mr. Pegg was hauling became unhooked from the semi tractor Mr. Pegg was operating. The tractor-trailer separated as Mr. Pegg was turning left at an intersection. The kingpin that held the trailer to the semi tractor's fifth wheel had become disconnected from the fifth wheel. The trailer came to rest on the street. There was damage to the trailer. The damage was limited to the driver side fender of the trailer and the driver side dolly foot. Mr. Pegg immediately notified Mr. Knetter of the incident and Mr. Knetter immediately reported to the scene of the accident. Mr. Pegg had followed standard procedure when he hooked the tractor to the trailer at the ADM facility to ensure that the tractor and trailer were properly connected. At Mr. Knetter's instruction, Mr. Pegg contacted a tow truck driver to remove the tractor from the scene of the accident.

Mr. Knetter subsequently directed shop mechanic Dave Michael to test the fifth wheel on the semi tractor and the kingpin on the trailer for mechanical defects. Mr. Michael was able to successfully connect a dummy kingpin into the fifth wheel a couple times and then hooked a trailer to the semi tractor. Mr. Michael was unable to reproduce a situation in which the trailer became separated from the tractor.

Ms. Pegg had operated the same semi tractor on December 19, 2011. On that day, an incident similar to the December 3, 2012 incident occurred. The kingpin of the trailer Mr. Pegg was pulling with the semi tractor became separated from the tractor's fifth wheel as Mr. Pegg was making a left turn near the employer's terminal. Another employee had connected the tractor to the trailer. Under those circumstances, the employer's established practices required that Mr. Pegg perform a pre-trip inspection. The pre-trip inspection would include making certain that the tractor and trailer were appropriately hitched. On that occasion, Mr. Pegg had not done a pre-trip inspection.

The employer considered two other incidents of alleged carelessness and/or negligence in making the decision to discharge Mr. Pegg from the employment. On July 5, 2012, Mr. Pegg failed to properly communicate with a customer with regard to off-loading soy oil. One end of a hose was attached to the trailer Mr. Pegg had been pulling. The customer needed to hook up the other end of the hose. Mr. Pegg did not clearly communicate to the customer the need to hook up the hose prior to discharging some of the soy oil. A spill resulted.

On September 5, 2012, Mr. Pegg attempted to single-handedly replace a 300 to 400 pound barrel of cleaning liquid in the employer's wash bay so that he could perform assigned cleaning work. The barrel got away from Mr. Pegg and Mr. Pegg suffered injury.

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 is insufficient to establish misconduct in connection with the final incident that triggered the discharge. What is undisputed is that the tractor and trailer separated from each other. What is in question is why they separated from one another. The employer asserts it must have been error on the part of Mr. Pegg. The employer cites Mr. Michael's inability to reproduce a situation leading to disengagement of the trailer's kingpin from the tractor's fifth wheel. On the other hand, Mr. Pegg had pulled that same rig across town to deliver waste water and argues that rig would have separated earlier if the problem was failure to properly secure the kingpin to the fifth wheel. The administrative law judge concludes there is insufficient evidence to establish, by a preponderance of the evidence, that the December 3 accident occurred as a result of Mr. Pegg failing to properly secure the tractor-trailer, rather than an equipment malfunction. Because the evidence fails to establish carelessness or negligence in connection with the final incident that triggered the discharge, the evidence in the record fails to establish a current act of misconduct. Because the evidence fails to establish a current act of misconduct, the administrative law judge concludes that Mr. Pegg was discharged for no disqualifying reason. Because the evidence fails to establish a current act of misconduct, the administrative law judge need not consider allegations of misconduct in connection with earlier incidents.

Because Mr. Pegg was discharged for no disqualifying reason, he is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The Agency representative's January 4, 2013, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs