

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

MARCUS L BELL

Claimant

APPEAL NO. 18A-UI-11443-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FEDERAL EXPRESS CORP

Employer

OC: 10/28/18

Claimant: Respondent (2)

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

Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 15, 2018, reference 01, decision that held the claimant was eligible for benefits provided he met all other eligibility requirements and that the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on October 30, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on December 21, 2018. Claimant Marcus Bell participated. Peggy Leight of Equifax represented the employer and presented testimony through Kady Egan. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant (DBRO). Exhibits 1 through 8, 10, A, B and C were received into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant was overpaid benefits.

Whether the claimant must repay overpaid benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Marcus Bell was employed by Federal Express Corporation (FedEx) as a full-time swing courier from November 2017 until October 31, 2018, when Operations Manager Kady Egan discharged him from the employment. As a swing courier, Mr. Bell's route assignment and work hours changed from day to day.

October 24, 2018, Mr. Bell operated the employer's cargo van on an unfamiliar gravel road, lost control of the vehicle as he rounded a corner too quickly, traveled down into the ditch, and came to rest in contact with a farmer's fence. The driving conditions were clear and dry. There were no extraordinary gravel road condition issues. The incident resulted in damage to the employer's van that included damage to the oil pan as a result of Mr. Bell "bottoming out." The incident resulted in significant damage to the farmer's fence, which damage included completely dislodging a fence post and attached barbed wire fence, all of which had been in place to keep the farmer's cattle contained in a field. The substantial damage to the fence was readily obvious. The incident also spilled a substantial amount of oil on the farmer's field. The spill was readily obvious. Without regard to the damage he had caused to the farmer's property or to the employer's cargo van, Mr. Bell drove the employer's cargo van back onto the roadway and continued a short distance with the intent to move on to his next delivery. About a quarter mile from where he had gone off the road, Mr. Bell concluded the vehicle was leaking too much oil and that he would need to contact the employer to get a different delivery vehicle to continue his route. Mr. Bell contacted a dispatcher and falsely reported that he had bottomed out in a farmer's driveway when making a delivery. Mr. Bell told the dispatcher that the vehicle was leaking oil. Mr. Bell intentionally omitted reference to the damage he had caused to the farmer's property. Under the employer's written policy, Mr. Bell was required to immediately report the incident to a manager or, if a manager was unavailable, to a dispatcher. Mr. Bell did not request to speak to a manager when he contacted the dispatcher, though a manager was available. Under the employer's written policy, Mr. Bell was required to remain at the scene of the accident until a manager assessed the scene and released him to depart from the scene. The employer had not provided Mr. Bell with the above-referenced written policy. After the dispatcher had Mr. Bell confirm the amount of oil lost, the dispatcher arranged for another employee to bring Mr. Bell a new cargo van so he could continue on his delivery route and arranged to have the original cargo van towed to the employer's repair shop. In his post-trip vehicle inspection report, Mr. Bell referenced the oil leak, but again elected to omit reference to the obvious property damage his actions had caused. Because Mr. Bell took no steps to alert the employer, the employer had no opportunity to assess the property damage at the time it occurred.

The employer first learned about the damage to the farmer's property on October 29, 2018, when the property owner contacted the employer regarding the damage to the fence. The farmer had taken photos to document the damage to the fence, but then had repaired the fence to contain his cattle. Before Ms. Egan spoke with the farmer, she contacted Mr. Bell to inquire about damage the October 24 incident may have caused to the farmer's property. Mr. Bell confirmed the location of the incident. When Ms. Egan told Mr. Bell the farmer was asserting there had been substantial damage to the farmer's fence, Mr. Bell dishonestly denied that he had damaged the farmer's fence and asserted that he "had only ditched it a little," meaning he had merely gone into the ditch. Ms. Egan went to the scene of the incident and documented the oil spill in the field and the oil spill on the road. Ms. Egan collected the photos the farmer had taken prior to fixing the fence and took photos of the repaired fence. Ms. Egan took photos of the damaged cargo van. On October 30, 2018, Ms. Egan suspended Mr. Bell from the employment pending further investigation of the matter. On October 31, 2018, Ms. Egan notified Mr. Bell that he was discharged from the employment for failure to report the property damage accident and for leaving the scene of the property damage accident.

Mr. Bell established an original claim for benefits that Iowa Workforce Development deemed effective October 28, 2018. Mr. Bell received \$3,027.00 in benefits for the eight weeks between October 27, 2018 and December 22, 2018. Federal Express Corporation is a base period employer in connection with the claim.

On November 14, 2018, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Mr. Bell's separation from the employer. At the time of the fact-finding interview, the deputy contacted LeAnn Schering, an Equifax Unemployment Insurance Claims Specialist, at the employer's telephone number of record. Ms. Schering spoke to the deputy for the limited purpose of requesting that the deputy consider the documents the employer had submitted to Iowa Workforce Development prior to the fact-finding interview. Those documents outlined the basis for the discharge in substantial detail and were the same documents that the employer submitted as exhibits for the appeal hearing. Mr. Bell provided a verbal statement to the deputy, but intentionally omitted any reference to damaging the farmer's property, electing not to report that damage to the employer, and intentionally misleading the employer when initially reporting the incident.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(4).

The weight of the evidence in the record establishes a discharge for misconduct in connection with the employment. The evidence establishes that Mr. Bell carelessly operated the employer’s cargo van on October 24, 2018 and thereby caused damage to the vehicle and to a property owner’s fence and field. Mr. Bell then left the scene of the property damage accident in a manner that indicates an attempt to avoid responsibility for the damage. The weight of the evidence establishes that the damage to the farmer’s property and to the employer’s vehicle was obvious to Mr. Bell at the time of the incident. Only when Mr. Bell determined he could not continue to operate the cargo van did he take steps to alert the employer to an issue with the van. However, Mr. Bell was intentionally dishonest in reporting the matter to the employer. Mr. Bell continued his dishonesty when Ms. Egan questioned him about the matter on October 29, 2018. Mr. Bell’s intentionally dishonesty in all facets of the matter demonstrated an intentional and substantial disregard for the employer’s interests and constituted misconduct in connection with the employment.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the base period employer failed to participate in the initial proceeding, the base period employer’s account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Mr. Bell received \$3,027.00 in benefits for the eight weeks between October 27, 2018 and December 22, 2018, but this decision disqualifies him for those benefits. Accordingly, the benefits Mr. Bell received constitute an overpayment of benefits.

Iowa Administrative Code rule 817-24.10(1) defines employer participation in fact-finding interviews as follows:

Employer and employer representative participation in fact-finding interviews.
24.10(1) “Participate,” as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2,

means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

The documentation the employer submitted for the fact-finding interview was sufficient, if unrebutted, to prove misconduct in connection with the employment and satisfied the participation requirement. In addition, Mr. Bell provided an intentionally misleading statement to the deputy at the time of the fact-finding interview. Accordingly, Mr. Bell is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

DECISION:

The November 15, 2018, reference 01, decision is reversed. The claimant was discharged on October 31, 2018 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant was overpaid \$3,027.00 in benefits for the eight weeks between October 27, 2018 and December 22, 2018. The claimant must repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs