

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CLARENCE R BEAVERS
Claimant

APPEAL NO. 14A-UI-12707-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FEDERAL EXPRESS CORP
Employer

OC: 11/09/14
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 December 1, 2014, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged; based on an Agency conclusion that the claimant had been discharged for no disqualifying reason. After due notice was issued, a hearing was held on January 26, 2015. Claimant Clarence Beavers participated. Geoff Hermsen of Equifax Workforce Solutions represented the employer and presented testimony through Sandy Forsyth and Gabriel Rice. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Five, A, and B into evidence. The administrative law judge took official notice of the materials submitted for and generated 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 discharge was based on a current act.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Clarence Beavers was employed by Federal Express Corporation as a full-time courier until November 11, 2014 when the employer discharged him for alleged failure to report an accident and occurrence in violation of the employer's written work rules. The policy required that Mr. Beavers notify a member of management if he made contact with a person, vehicle, or property. The policy required that Mr. Beavers not leave the scene of such incident until a member of management responded to the scene. A separate policy indicated that failure to properly notify the employer of an accident or occurrence would subject an employee to discharge from the employment. The employer's definition of "accident" and "occurrence" both were based on physical contact with another person or object.

The employer's decision to discharge Mr. Beavers was based on an incident that took place on October 20, 2014. On that day, Mr. Beavers was making a right turn in Newton when he was distracted by something to his right. Mr. Beavers heard a swooshing sound and then saw a vehicle pull over to the side of the road on his left. Mr. Beavers initially concluded he might have hit the other vehicle but then concluded that he had merely been in a near-miss situation. Mr. Beavers got out to speak with the teenage driver and teenage passenger of the vehicle that had pulled over. Both indicated they were fine. Mr. Beavers noted that there was a mark down the entire side of the over vehicle. The other driver told Mr. Beavers that the mark was already there and that everything was fine. Mr. Beavers concluded there had been no contact between his truck and the other vehicle. The other motorist drove away before Mr. Beavers could take any additional steps. The employer had a packet of materials inside Mr. Beavers assigned work truck for use in an accident. The packet provided step-by-step instructions regarding what the driver was expected to do in the event of an accident. The packet included a release form that the FedEx driver was to have the other motorist sign if the other motorist was willing to release the FedEx driver and FedEx from liability in connection with an accident. Mr. Beavers was aware of the packet but did not complete any portion of the packet because he did not think there had been contact and because the other motorist had quickly driven away. Mr. Beavers did not notify the employer because he did not think he was required to do so when there had been no contact.

At some point between October 20, 2014 and November 6, 2014 the owner of the other vehicle involved in the October 20 near miss incident contacted the FedEx risk management department and alleged that FedEx was liability in connection with the October 20 incident. On October 6 Gabriel Rice, Operations Manager, received an email message from the risk management department and spoke with Mr. Beavers about the October 20 incident. Mr. Rice was Mr. Beavers' supervisor. Mr. Beavers acknowledged the employer's policy but asserted there had been no contact with the other vehicle and nothing to report to the employer. Mr. Rice suspended Mr. Beavers at that point. The employer subsequently discharged Mr. Beavers on November 11, 2014.

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.

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 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 employer has presented insufficient evidence and insufficiently direct and satisfactory evidence to establish misconduct in connection with the employment. The employer based the decision to discharge Mr. Beavers on his failure to report an "accident" or "occurrence." The employer's written definition of both presupposed there had been physical contact between the FedEx truck and a person or another vehicle. The employer has presented insufficient evidence to establish that Mr. Beavers did indeed make contact with the other vehicle. The employer presented insufficient evidence to rebut Mr. Beavers' assertion that the incident was a near-miss, rather than an actual accident or occurrence under the employer's policy. The employer presented no testimony from other motorist or even from the risk management personnel who spoke to the other motorist. The employer had the ability to present such testimony. Even if Mr. Beavers should have notified the employer of the incident, the weight of the evidence indicates that his failure to do would have been attributable to a good faith error in judgment, not willful or wanton disregard of the employer's interests.

Even if the employer had presented sufficient evidence to establish a violation of its policy, the employer presented insufficient evidence to establish a "current act." The incident that triggered the discharge occurred on October 20, 2014. The risk management personnel communicated with Mr. Rice did so on November 6, 2014. The employer has presented insufficient evidence to establish when the employer received the complaint from the other motorist and how much longer the risk management personnel sat on that information before contacting Mr. Rice.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Beavers was discharged for no disqualifying reason. Accordingly, Mr. Beavers is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The December 1, 2014, 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

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