

On September 2, 2016, an Iowa Department of Transportation Motor Vehicle Enforcement officer stopped the Claimant while he was driving truck for the Employer. The Claimant was wearing his seatbelt improperly by passing the belt under his shoulder. He was going 61 in a 55 zone. When the D.O.T. officer inspected the vehicle he noted a brake out of adjustment. The Claimant was required to check the brake adjustment as part of his daily pre-trip inspection. He had failed to note the brake in need of adjustment. The D.O.T. officer issued an inspection report that required the brake issue be fixed and noted the seatbelt and speeding problem. The Employer verbally counseled the Claimant over this.

On September 12, 2016 the Claimant rolled the employer’s tractor-trailer he was driving. At the time he was driving around a curve on the same highway where he had had the accident in February. The weather and road conditions were good. As the Claimant entered the curve he allowed one or more wheels on the right side of the truck to enter onto the gravel shoulder. He lost control of the truck and could not bring it back onto the hard surface of the road. He hit the road signs that marked the curve. The truck fell into the ditch and rolled over. The accident caused substantial damage to the tractor, trailer and load. As a result of the Claimant’s injuries from the accident, a doctor kept the Claimant off work for a week. On Tuesday, September 20, 2016, after receiving a medical release, the Claimant returned to work. He was fired that day for the final accident, the infractions of September 2, and the accident in February.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2016) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

The law limits disqualification to current acts of misconduct:

Past acts of misconduct. While **past acts and warning 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.

71 IAC 24.32(8)(emphasis added); *accord Ray v. Iowa Dept. of Job Service*, 398 N.W.2d 191, 194 (Iowa App. 1986); *Greene v. EAB*, 426 N.W.2d 659 (Iowa App. 1988); *Myers v. IDJS*, 373 N.W.2d 509, 510 (Iowa App. 1985).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

We find that the Employer has proven carelessness and/or negligence in connection with each of the three incidents that caused the termination. In this we part company with the Administrative Law Judge only on the first incident. We do understand that February roads in Iowa may be icy, and that ice is slippery. We, however, agree with the Employer that an experienced driver in Iowa, especially an experienced commercial truck driver, does not forcefully apply the brakes once they have begun to slide on ice. The record supports that the Claimant's braking only made things worse, that this was a foreseeable outcome, and that a reasonably prudent commercial trucker would not have done this. In other words, the Claimant was negligent in the February accident. We do concur with the Administrative Law Judge that the failure to inspect the brakes, and the improper wearing of the seatbelt also establishes negligence in connection with the operation of the truck. We disregard going 61 in a 55 zone. We also concur that the rollover was a result of negligent driving by the Claimant, and like the Administrative Law Judge do not credit his gravel explanation.

Given these three acts of negligence over seven months we find that the Employer has proven a pattern of carelessness by the Claimant of such a degree of recurrence as to constitute misconduct under rule 24.32(1)(a). Specifically, we conclude that the Employer has proven a pattern of carelessness by the Claimant that is of "equal culpability" to a "deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees." "Culpability" is defined by Black's Law Dictionary to mean "blameworthiness." See also *Webster's Third International Dictionary, Unabridged*, (1961)(giving "blameworthiness" for definition of culpability). Black's goes on to provide that even in criminal cases "culpability requires a showing that the person acted purposely, knowingly, *recklessly, or negligently* with

respect to each material element...” The word “culpable” is defined in Black’s to mean “1. Guilty; *blameworthy* 2. *Involving the breach of a duty.*” Webster’s massive unabridged dictionary notes that the stronger sense of “culpable” meaning “criminal” is in fact “obsolete.” Instead for modern definitions of “culpable” the 3rd unabridged gives “meriting condemnation or censure esp. as criminal <~ plotters> <~ homicides> or as *conducive to accident*, loss, or disaster <~ *negligence*>.” *Webster’s Third International Dictionary, Unabridged, (1961)*(emphasis added). Applying the standards of rule 24.32(1)(a) governing repeated carelessness we find that the claimant’s pattern of carelessness proven on this record demonstrates negligence of such a degree of recurrence as to constitute culpable negligence that is as equally culpable as intentional misconduct.

DECISION:

The administrative law judge’s decision dated December 6, 2016 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, he is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant’s weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)(a).

The Board remands this matter to the Iowa Workforce Development Center, Claims Section, for a calculation of the overpayment amount based on this decision.

Kim D. Schmett

James M. Strohman

DISSENTING OPINION OF ASHLEY R. KOOPMANS:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

Ashley R. Koopmans

RRA/fnv