

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOHN E GOLDSMITH
Claimant

APPEAL NO. 15A-UI-04738-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

J & L LOGISTICS INC
Employer

OC: 01/11/15
Claimant: Respondent (5)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 10, 2015, reference 02, decision that that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged on December 28, 2014 for no disqualifying reason. After due notice was issued, a hearing was held on May 28, 2015. Claimant participated. Kari Krajicek represented the employer and presented additional testimony through Lottie Krajicek. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. 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.

ISSUE:

Whether the claimant separated from the employment for a reason that disqualifies him for benefits or that relieves the employer of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: J & L Logistics, Inc., is a family-owned, commercial trucking company. Jason Krajicek is President. Lottie Krajicek is Vice President. Kari Krajicek is bookkeeper. Lottie Krajicek is the mother of Jason and Kari Krajicek. J & L Logistics leases its trucks another Krajicek family-owned trucking business, Krajicek, Inc. Ed Krajicek is President of Krajicek, Inc. Ed is Lottie's husband and Jason and Kari's father. While Ed Krajicek has no formal title with J & L Logistics, Inc., he operates as a de facto supervisor over J & L Logistics drivers.

John Goldsmith was employed by J & L Logistics as a full-time over-the-road truck driver from December 2013 until on or about December 18, 2014, when Ed Krajicek discharged him from the employment. Ed Krajicek and dispatcher Shawn Rhoades functioned as Mr. Goldsmith's immediate supervisors. On or about December 18, 2014, Mr. Goldsmith was on a return trip from Denver, Colorado enroute to Dennison, Iowa, when Ed Krajicek telephoned home and directed him to clean out the truck when he got back because he was terminated. Ed Krajicek did not provide Mr. Goldsmith with a reason for the discharge. When Mr. Goldsmith reached

Omaha, he called Ed Krajicek because he was out of fuel. Before Mr. Goldsmith had left Colorado, the employer had elected not to have him fully fuel the employer's truck. When Mr. Goldsmith called Mr. Krajicek from Omaha, Mr. Krajicek remotely authorized \$50.00 in fuel and reiterated that Mr. Goldsmith was to clean out the truck when he got back. Based on the notice that he was being discharged from the employment, Mr. Goldsmith elected to stop at his home in Sergeant Bluff, Iowa to clean his personal effects out of the employer's truck before returning the truck to Dennison. Mr. Goldsmith would otherwise have lacked a means to get his personal effects home. As Mr. Goldsmith was enroute to Dennison, the truck ran out of gas. Mr. Goldsmith concluded that there must have been a mechanic failure because the passenger side fuel tank was half full. The employer arranged for more gas. Mr. Goldsmith left the employer's truck at the employer's yard and separated from the employment.

Mr. Goldsmith established a claim for benefits that was effective January 11, 2015 and received benefits. The employer participated in the April 3, 2015 fact-finding interview through Kari Krajicek.

REASONING AND CONCLUSIONS OF LAW:

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

The employer presented insufficient evidence to rebut Mr. Goldsmith's testimony that he was discharged from the employment. The employer's witnesses lacked personal knowledge concerning the events that led to Mr. Goldsmith's separation from the employment. Though the hearing notice was mailed to the parties more than a month before the hearing, the employer elected not to line up Ed Krajicek as a witness for the hearing. During the hearing, the administrative law judge provided the employer with an opportunity to secure Mr. Krajicek, but the employer was unable to make contact with Mr. Krajicek at that time on short notice. The evidence in the record fails to establish that Mr. Goldsmith ever expressed an intention to sever the employment relationship.

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 a discharge 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).

While the employer witnesses conceded lack of personal knowledge concerning the nature and particulars of Mr. Goldsmith's separation from the employment, the evidence suggests a concern about Mr. Goldsmith driving out of route. The only evidence of such conduct was

Mr. Goldsmith's decision to stop at home before returning the employer's truck to Dennison. Under the circumstances, Mr. Goldsmith's decision was reasonable. In any event, the weight of the evidence indicates that that out-of-route incident occurred after Mr. Goldsmith had been notified that he was discharged from the employment.

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

DECISION:

The April 10, 2015, reference 02, decision is modified only to amend the date of the separation to December 18, 2014. 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