IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

STEVEN M CLANEY
Claimant

CHAMNESS TECHNOLOGY INC
Employer

APPEAL NO: 14A-UI-10738-DWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/21/14
Claimant: Appellant (1)

Iowa Code § 96.5(2)a - Discharge

PROCEDURAL STATEMENT OF THE CASE:

The claimant appealed a representative's October 7, 2014 determination (reference 01) that disqualified the claimant from receiving benefits and held the employer's account exempt from charge because he had been discharged for disqualifying reasons. The claimant participated at the November 4 hearing with his attorney, John Breitbach. Doug Jansen, the human resource and safety director, and Les Gunderson, the equipment maintenance manager, appeared on the employer's behalf. During the hearing, Employer Exhibits One through Eleven were offered as evidence. All exhibits with the exception of Employer Exhibits Four and Eleven, were admitted as evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge concludes the claimant is not qualified to receive benefits.

ISSUE:

Did the employer discharge the claimant for reasons constituting work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer in August 2010. The claimant worked as a full-time semi-truck driver. The claimant received a copy of the employer's cell phone policy in October 2011 and on September 23, 2013. (Employer Exhibits Two, Six.) The employer's cell phone policy informs drivers they cannot use a cell phone while driving a semi-truck. The employer requires a driver to pull off the road so they are not driving when they use a cell phone. The policy also informs employees they will receive a verbal warning, a written warning and then can be discharged for violating this policy. (Employer Exhibits One, Six.) The employer has a sign in semi-trucks that reminds employees there is no dialing, texting, or hand-held cell phones while driving. (Employer Exhibit Three.)

The employer believed the claimant received a verbal warning for using his cell phone while driving on March 28, 2013. The claimant did not sign a warning and does not remember receiving a verbal warning.

On September 23, 2013, the claimant received a written warning for using his cell phone while driving a semi-truck for the employer. (Employer Exhibit Five.) The claimant verbally protested the written warning, but did not document his objections on paper. The claimant understood that if he had another violation within a few weeks, his job was in jeopardy. But if he did not have another violation for about year, the employer would probably not discharge him.

On July 28, 2014, Gunderson saw the claimant driving the employer's truck while he was on his cell phone. Gunderson reported the incident to the claimant's supervisor. Gunderson did not know if the claimant had any previous violations. Gunderson also reported the incident to the human resource department. The claimant's supervisor did not address the July 28 incident with the claimant.

On September 11, Gunderson contacted the claimant's co-driver, J.K., to find out when they would be back. At the time Gunderson called, the claimant and J.K. were still on the customer's property. Gunderson asked J.K. to have the claimant call him before they left the customer's property. J.K. did not tell the claimant to call Gunderson until they were leaving the property. The claimant did not know why Gunderson wanted to be called. The claimant called Gunderson while he was driving and just leaving the customer's property. The claimant was driving on a gravel road and was going about 5 miles an hour when he talked to Gunderson. The claimant told Gunderson he was using a hands free device, but was actually holding the cell phone handset. (Employer Exhibit Eight.)

After the claimant and J.K. returned, J.K. told Gunderson that the claimant had been driving and holding a cell phone handset when he called and talked to Gunderson. On September 16, 2014, the employer discharged the claimant for failing to follow the employer's cell phone policy. (Employer Exhibit Ten.)

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code § 96.5(2)a. 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 willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

The law defines misconduct as:

> 1. A deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment.
> 2. A deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees. Or
> 3. An intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion do not amount to work-connected misconduct. 871 IAC 24.32(1)(a).

The claimant received the employer's cell phone policy and understood the employer's policy did not allow a driver to use a cell phone hand set while driving. The claimant does not recall receiving a verbal warning for a March 28, 2013 incident. Even if the claimant did not receive a verbal warning, he received a written warning on September 23, 2013. After receiving the written warning, the claimant knew or should have known he could be discharged if the employer again observed him violating the employer's cell phone policy.

The next time the employer learned the claimant violated the employer's cell phone policy and confronted the claimant was on September 11. Gunderson received information the claimant was driving while talking on his hand held cell phone. The claimant acknowledged he was driving while talking on his cell phone. Even though the claimant was only driving 5 miles an hour, he violated the employer's cell phone policy. Initially, when Gunderson talked to the claimant, he was less than truthful and reported that he was talking on a hands free device. The claimant's decision to drive instead of waiting to call until he could pull over and call Gunderson amounts to an intentional and substantial disregard of the standard of behavior the employer has a right to expect from a claimant. The claimant committed work-connected misconduct when he was less than truthful to Gunderson and reported he was talking on a hands free device. As of September 21, 2014, the claimant is not qualified to receive benefits.

DECISION:

The representative's October 7, 2014 determination (reference 01) is affirmed. The employer discharged the claimant for reasons constituting work-connected misconduct. As of September 21, 2014, the claimant is disqualified from receiving unemployment insurance benefits. This disqualification continues until he has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged.

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Debra L. Wise
Administrative Law Judge

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Decision Dated and Mailed

dlw/pjs