IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ANTHONY HARVEY
Claimant

JACOBSON STAFFING COMPANY LC
Employer

APPEAL NO: 11A-UI-14763-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10-02-11
Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 2, 2011, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on January 11, 2012. The claimant participated in the hearing. Frank Tursi, operations manager and Joey Moore, account manager, participated in the hearing on behalf of the employer. Employer's Exhibits One through Six were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time south line lead man for Jacobson Staffing Company last assigned at Titan Distribution from June 4, 2010 to October 4, 2011. On September 26, 2011, the claimant and co-worker Isaac were both driving forklifts. Isaac came up behind the claimant and began honking while the claimant was waiting for another employee to pass in front of him. They continued driving their forklifts down a hallway, with Isaac swerving from side to side. Isaac then tried to pass the claimant and hit him on the back left corner of the forklift while going 10 to 15 miles per hour. The impact raised and broke the seat of the forklift the claimant was driving, pushing the claimant against the steering wheel. The collision slightly bent one of the forks on the forklift Isaac was driving. Isaac continued driving past the claimant before returning and telling the claimant to tell the employer the claimant scraped his forklift against a wall so it would be considered an accident and neither of them would lose their jobs. The claimant told Isaac he was not going to lie to the employer and Isaac responded that they needed to "get (their) stories straight" so the situation appeared to be an accident. The claimant refused and reported the incident to the supervisor. The employer learned of the situation September 28, 2011, and suspended the claimant and Isaac. It took statements from employees, including the claimant and Isaac, with only one other employee actually stating he saw the incident, and that employee said the claimant and Isaac were engaged in horseplay when the accident occurred (Employer's Exhibit Two through Five). The employer terminated both the claimant's and

Isaac's employment for horseplay. The claimant signed a Forklift Safety Memo May 18, 2011, which included the statement, "Horseplay on a forklift will not be tolerated and is grounds for immediate termination" (Employer's Exhibit One). The claimant received a written warning July 25, 2011, for failing to wear his seatbelt while driving a forklift (Employer's Exhibit Six). The claimant adamantly denies he was involved in horseplay September 22, 2011, but maintains Isaac was swerving around and trying to pass him when the incident occurred.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code section 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.

871 IAC 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.

The employer has the burden of proving disqualifying misconduct. 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 N.W.2d 661, 665 (Iowa 2000). While the employer believes the claimant was involved in horseplay with Isaac when the accident with the forklifts occurred, the claimant credibly argued that Isaac was engaged in horseplay but he was not.

Isaac was following the claimant at a speed of 10 to 15 miles per hour and tried to pass him, clipping the back left portion of the claimant's forklift, breaking the seat of his forklift and pushing the claimant against the steering wheel. Notwithstanding Mr. Williams' written statement, he was not present to testify or be cross-examined at the hearing, and the claimant testified he was not in a position to see what actually happened. The claimant's testimony that he did not participate in horseplay resulting in the accident was both credible and persuasive. Consequently, the administrative law judge must conclude the employer has not met its burden of proving disqualifying job misconduct as that term is defined by Iowa law. Therefore, benefits are allowed.

DECISION:

The November 2, 2011, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/kjw