

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROBERT D JOHNSTON
Claimant

APPEAL NO. 17A-UI-04140-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CALDWELL AND HARTUNG INC
Employer

**OC: 02/12/17
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Robert Johnston filed a timely appeal from the April 11, 2017, reference 03, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Mr. Johnston was discharged on March 24, 2017 for violation of a known company rule. After due notice was issued, a hearing was held on May 23, 2017. Mr. Johnston participated personally and was represented by non-attorney representative Jon Geyer. Rose Ballard represented the employer. The employer used an unorthodox exhibit numbering system. Exhibits 3A, 3B, 3C, 3I, 3J, 3K, 5, 5A, 5B, 5C, 6D, 6E, 6F, 6G, 6H and 10 were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Robert Johnston was employed by Caldwell and Hartung, Inc. as a full-time commercial truck driver from 2015 until March 24, 2017, when Joyce Ostrander, owner and Vice President, and Franklin Ballard, Safety Director, discharged him from the employment. Ms. Ostrander notified Mr. Johnston of the discharge. Mr. Johnston hauled commercial freight. Mr. Johnston's work required a commercial driver's license (CDL). Mr. Johnston obtained his CDL toward the beginning of the employment. The employment subjected Mr. Johnston to Federal Motor Carrier Safety Administration (FMCSA) regulations set forth at 49 C.F.R. § 395. These regulations included hours of service (HOS) regulations set forth at 49 C.F.R. § 395.3. While Mr. Johnston asserts that the requirements to obtain a CDL did not include training in hours of service limits and log book completion, the requirements to obtain the CDL would have included a requirement that Mr. Johnston demonstrate understanding of such matters. The HOS regulations included the following:

Rest breaks. Except for drivers who qualify for either of the short-haul exceptions in §395.1(e)(1) or (2), driving is not permitted if more than 8 hours have passed since the end of the driver's last off-duty or sleeper-berth period of at least 30 minutes.

49 C.F.R. § 395.3(a)(3)(ii). 49 C.F.R. § 395.1(e)(1) and (2) pertain to short-haul operations. When Mr. Johnston began the employment, the employer assigned him to short-haul duties. At about six months into the employment, the employer began to assign long-haul duties within the state of Iowa. While Mr. Johnston needed guidance early on in making certain that he was completing the paper log correctly, Mr. Johnston subsequently mastered that task.

The employer had automatic on-board record devices installed in the employer's trucks. The electronic logging device (ELD) automatically recorded the drivers' hours of service information including driving time, miles driven, location, and relevant time and date information. Mr. Johnston was also expected to maintain a paper log of his hours of operation while performing the long-haul duties. The employer required Mr. Johnston to complete a daily work ticket to be delivered to a designated box at the end of his shift. The employer used the information contained on the work ticket and the electronic logging device for payroll and for billing customers. Mr. Johnston frequently provided a copy of his paper driver's log to the employer with his work ticket, but did not always provide a paper log.

The final conduct that triggered the employer's decision to discharge Mr. Johnston concerned Mr. Johnston's alleged violation of the federal hours of operation limits on March 17, 20, and 21, 2017.

The electronic log record for March 17, 2017 indicates an hours of service violation. The electronic log record indicates that Mr. Johnston commenced driving at 6:56 a.m. and did not go off duty for a break until 4:10 p.m. That meant that Mr. Johnston was in on-duty status for nine hours and 14 minutes before he took the break that was mandated once he been on-duty for eight hours. Mr. Johnston elected to pause in Clive for the break before continuing to the employer's facility in Des Moines. When Mr. Johnston completed his daily work ticket he indicated that he had commenced work at 6:23 a.m. Mr. Johnston documented that he had taken his lunch break from 2:30 p.m. to 3:00 p.m. That was not true. Mr. Johnston did not provide the employer with a paper log for that day.

The electronic log record for March 20, 2017 indicates an hours of service violation. The electronic log record indicates that Mr. Johnston commenced driving at 6:41 a.m. and did not go off-duty for a rest break until 6:21 p.m. That meant that Mr. Johnston was on-duty for 11 hours and 40 minutes before he took the rest break that was mandated once he had been on-duty for eight hours. Mr. Johnston again elected to pause in Clive before continuing to the employer's facility in Des Moines. When Mr. Johnston completed his daily work ticket, he documented that he had started working at 6:24 a.m. and concluded his work day at 7:45 p.m. In addition, Mr. Johnston documented that he had taken his lunch break from 2:30 p.m. to 3:00 p.m. That was not true. Mr. Johnston did not provide the employer with a paper log for March 20.

The electronic log record for March 21, 2017 does not reflect any violations of the hours of service limits. The log indicates that Mr. Johnston began driving at 6:40 a.m., went off-duty for about 47 minutes at 2:06 p.m. in Clive, began to drive to the employer's Des Moines yard or terminal at 2:53 p.m. and ceased driving at 3:21 p.m. While there was no violation of the federal hours of service regulations that day, the employer faulted Mr. Johnston for taking the afternoon break. Mr. Johnston's work ticket indicated that he had gone on duty at 6:26 a.m. and had completed his work day at 3:30 p.m. The work ticket indicated that Mr. Johnston had refueled at

2:08 p.m. and then had taken a 30-minute lunch break. Mr. Johnston documented the lunch break on the paper log that he turned in to the employer.

The employer considered a number of earlier unrelated concerns and reprimands when making the decision to discharge Mr. Johnston from the employment. These included instances wherein Mr. Johnston engaged in profane outbursts in response to being assigned non-preferred trucks.

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 weight of the evidence in the record establishes that Mr. Johnston knowingly and intentionally violated the FMCSA hours of service regulations on March 17 and 20, 2017. In addition, the evidence establishes that Mr. Johnston knowingly and intentionally provided false information on his daily work ticket for each day by indicating on each that he had taken the required rest break from 2:30 p.m. to 3:00 p.m., when he actually taken the break substantially later. Mr. Johnston's violation of the hours of services regulations and his intentional dishonesty in completing the daily work ticket demonstrated intentional and substantial disregard of the employer's interests and exposed the employer to potential sanction in connection with the violations.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Johnston was discharged for misconduct. Accordingly, Mr. Johnston is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Johnston must meet all other eligibility requirements. The employer's account shall not be charged.

DECISION:

The April 11, 2017, reference 03, decision is affirmed. The claimant was discharged on March 24, 2017 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs