IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

DALE R MOORE Claimant **ASCHENBRENNER TRUCKING INC** Employer	**APPEAL 17A-UI-03926-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/12/17** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the March 30, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on May 8, 2017. The claimant did not respond to the notice of hearing to furnish a phone number with the Appeals Bureau and did not participate in the hearing. The employer participated through Mike Aschenbrenner, president. Dan Butler, mechanic, also testified. Employer exhibit 1 (appeal letter) was received into evidence.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:
Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a service technician and was separated from employment on March 7, 2017, when he was discharged for "badmouthing a driver."

The employer was unaware if the claimant was issued a copy of the employer handbook/rules. The employer did not have a policy related to the reason for discharge, as it applies to mechanics, or people in the claimant's position. The employer was unaware if the claimant had been issued any written discipline, and could not recall dates or specific incidents involving verbal warnings. The employer stated the claimant had been told "weeks before" to "settle

down" in response to his excessive use of his personal cell phone while working, and for leaving early without permission. Mr. Aschenbrenner stated he had sent the claimant home several times without pay but could not recall when or specific incidents that triggered it. The employer asserted the claimant had on multiple occasion's badgered drivers or called them stupid, blaming them for repairs needed.

The final incident occurred when a driver who requested a tire repair, complained to Mr. Aschenbrenner that the claimant had been badmouthing him, and requested he wait to complete the tire repair. The exact words used to Mr. Fish, the driver, were not presented at the hearing, as neither Mr. Aschenbrenner nor Mr. Butler heard the claimant. However, Mr. Fish reported to Mr. Aschenbrenner that the claimant "blew up on me" and that he was going to quit because he was tired of dealing with the claimant. Mr. Aschenbrenner determined losing his driver was not acceptable, and walked over to the claimant. When he asked him about what happened, the claimant "hem-hawed" to which he was then asked to get his stuff and leave, thereby initiating the discharge.

The administrative record reflects that claimant has received unemployment benefits in the amount of $1840.00, since filing a claim with an effective date of March 12, 2017. The administrative record also establishes that the employer did participate in the March 29, 2017 fact-finding interview by way of secretary, Sharon Sedore.

REASONINGS AND CONCLUSIONS OF LAW:
For the reasons that follow, the administrative law judge concludes the claimant was not discharged from employment due to job-related misconduct.
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).

"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).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct.
It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.*. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

In this case, the employer could not state and did not furnish a copy of any applicable rule or policy related to the claimant's discharge. The employer witnesses were unsure if the claimant had ever been issued written discipline prior to discharge and could not provide any specific dates or incidents to which the claimant was verbally reprimanded. The employer only stated the claimant had been told "weeks before" to "settle down" in response to his excessive use of his personal cell phone while working, and for leaving early without permission. Inasmuch as employer had not previously warned the claimant about the issue leading to the separation, Inasmuch as the employer has not established the claimant was warned, it has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning

that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

Iowa Admin. Code r. 871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings 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.

In addition, the administrative law judge is not persuaded the claimant was discharged based on a final or current act of misconduct, as required. With regard to the final incident, the only specific information the employer could furnish was that a driver, Mr. Fish, stated he would quit the employment because he was tired of the claimant, who had reportedly "blown up" on him. No specific words or actions were presented by the employer of what the claimant said to Mr. Fish. No witness, including Mr. Fish, attended the hearing or provided a written statement about details regarding the claimant's actions that led to his discharge. Based on the evidence presented, the employer has failed to provide sufficient evidence that the claimant was aware his job was in jeopardy or that a final act of misconduct occurred. While the employer may have had good business reasons to discharge the claimant, it has failed to establish he was discharged for misconduct under Iowa law. Benefits are allowed.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges for the employer are moot.

DECISION:

The March 30, 2017, (reference 01) decision is AFFIRMED. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The claimant is not overpaid benefits. The employer is not relieved of charges associated with the claim.

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Jennifer L. Beckman
Administrative Law Judge

_____
Decision Dated and Mailed

jlb/scn