

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JIM L PORTER

Claimant

APPEAL NO. 16A-UI-11449-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ERLBACHER BROS INC

Employer

OC: 09/25/16

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Jim Porter filed a timely appeal from the October 18, 2016, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on an agency conclusion that Mr. Porter was discharged on September 12, 2016 for having too many accidents for which he was found to be at fault. After due notice was issued, a hearing was held on November 17, 2016. Mr. Porter participated personally and was represented by attorney Donna Bothwell. Dean Erlbacher represented the employer.

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: Jim Porter was employed by Erlbacher Bros., Inc. as a full-time commercial truck driver from September 2015 until September 20, 2016, when Dean Erlbacher, President, discharged him from the employment.

The final incident that triggered the discharge occurred on September 12, 2016. On that day, Mr. Porter was involved a single-vehicle rollover accident while operating the employer's tractor-trailer. The accident occurred when Mr. Porter was negotiating a curve on a highway that he regularly traveled as part of his work duties. Mr. Porter was not exceeding the speed limit. The weather and road conditions were good. Mr. Porter asserts there was a small amount of gravel on the road surface. As Mr. Porter entered the curve, he allowed one or more wheels on the right side of the tractor-trailer rig to enter onto the gravel shoulder. Mr. Porter lost control of the vehicle and could not bring it back onto the hard surface of the road. Mr. Porter hit the road signs that marked the curve. The vehicle proceeded into the ditch and rolled over. The accident resulted in substantial damage to the tractor, trailer and load. Mr. Porter was able to exit the cab by breaking a window. Law enforcement officers and paramedics responded to the scene. Mr. Porter was transported to a medical facility for evaluation. Mr. Porter was wearing a

seatbelt at the time of the accident. Law enforcement did not interview Mr. Porter concerning the incident and did not issue any citations in connection with the incident.

A doctor kept Mr. Porter off work for a week. On Monday, September 19, 2016, Mr. Porter attempted to return to work. Mr. Erlbacher requested a medical release. Mr. Porter obtained a medical release and reported for work the next day. At that time, Mr. Erlbacher spoke with Mr. Porter regarding the final accident and two earlier accidents and notified Mr. Porter that he was discharged from the employment.

In February 2016, Mr. Porter was involved in another single-vehicle accident with one of the employer's tractor-trailer rigs. That accident occurred on a different stretch of the same highway involved in the final incident. Mr. Porter was traveling the speed limit and was approaching a bridge over a creek when the tractor-trailer traveled over a patch of ice and began to slide. Mr. Porter attempted to regain control of the vehicle by applying the brake. The back end of the trailer slammed into the bridge railing with such force that the rear axle was torn from the trailer. The accident also resulted in substantial damage to the tractor. Mr. Porter was wearing his seatbelt. Law enforcement officers and paramedics responded to the scene. Mr. Porter was transported to a medical facility with minor injuries. Law enforcement did not issue any citations in connection with the incident. Mr. Porter was off work for a few weeks. Mr. Erlbacher faulted Mr. Porter for applying the breaks once the vehicle began to slide, given that applying the brakes under such circumstances would decrease the likelihood of maintaining or regaining control of the rig. Mr. Erlbacher verbally counseled Mr. Porter following the accident, but did not issue any formal reprimand or suggest that further similar incidents would lead to discharge from the employment.

On September 2, 2016, an Iowa Department of Transportation Motor Vehicle Enforcement officer stopped Mr. Porter while Mr. Porter was operating the employer's tractor-trailer rig. Mr. Porter had a seatbelt on, but was using it improperly by securing the belt under his shoulder. Mr. Porter was also traveling 61 miles per hour in a 55 mile per hour speed zone. During the stop, the D.O.T. officer inspected the vehicle and noted a brake that was out of adjustment. Mr. Porter was supposed to check the brake adjustment as part of his daily pre-trip inspection, but had failed to note the brake in need of adjustment. The D.O.T. officer issued an inspection report that required the brake issue be fixed and that noted the seatbelt and speeding concerns. Mr. Erlbacher verbally counseled Mr. Porter and perceived Mr. Porter to be receptive to the counseling. Mr. Erlbacher did not issue a formal written reprimand Mr. Porter or warn that future incidents could lead to discharge from the employment.

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 fails to establish misconduct in connection with the employment that would disqualify Mr. Porter for unemployment insurance benefits. The weight of the evidence establishes two incidents involving carelessness and negligence, but does not establish a pattern of such conduct that would indicate a willful and wanton disregard of the employer's interests. The weight of the evidence in the record establishes that the final incident that triggered the discharge was indeed an avoidable accident. Mr. Porter operated the employer's tractor-trailer rig in a careless and negligent manner as he was making the curve and caused the accident through his carelessness. A small amount of gravel on the traveled portion of the road way did not cause the single-vehicle accident. Mr. Porter had also performed his duties in

a careless and negligent manner on September 2, when he failed to properly inspect the wheel brake as part of the required pre-trip inspection, traveled 61 m.p.h. in a 55 m.p.h. speed zone, and failed to properly wear his seat belt. The evidence does not establish carelessness or negligence in connection with the February incident. That incident was wholly attributable to road conditions beyond Mr. Porter's control. Mr. Porter's application of the brake under such circumstances would have been an automatic response and did not rise to the level of carelessness or negligence.

The decision to end the at-will employment was within the employer's discretion. However, based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Porter was not discharged for misconduct in connection with the employment within the meaning of the law. Mr. Porter is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged..

DECISION:

The October 18, 2016, reference 01, decision is reversed. 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/rvs