

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

**STEVEN E PROBASCO**  
Claimant

**HOLMS RADIATOR LLC**  
Employer

**APPEAL NO. 21A-UI-17605-JT-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 06/06/21  
Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

The claimant, Steven Probasco, filed a timely appeal from the August 6, 2021, reference 01, decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant was discharged on June 6, 2021 for violation of a known company rule. After due notice was issued, a hearing was held on October 1, 2021. The claimant participated. Scot Johnson represented the employer and presented additional testimony through Bryon Okones, Tammy Hoeg, and Joel Christianson. Exhibits 2 through 11, A and B were received into evidence.

The claimant has listed three proposed additional witnesses: Kevin Hendrix, Todd Whittman, and Jeff King. When the administrative law judge contacted Mr. Hendrix for the hearing, Mr. Hendrix was at work, had not been notified of the date and time of the hearing, indicated he was a former employer of Holm's Radiator, L.L.C., but advised he did not witness and had no knowledge of the matters that led to the claimant's separation from this employer. Mr. Hendrix subsequently did not answer when the administrative law judge was ready to take his testimony. When the administrative law judge contacted Mr. Whittman for the hearing, Mr. Whittman had not been notified of the hearing and declined to participate. When the administrative law judge contacted Mr. King for the hearing, Mr. King expressed significant hesitance and discomfort with participating in the hearing. Mr. King subsequently did not answer when the administrative law judge was ready to take his testimony. The administrative law judge left a voicemail message for Mr. Hendrix and Mr. King, to which messages neither responded before or after the closing of the hearing record.

**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: The claimant, Steven Probasco, was employed by Holm's Radiator, L.L.C., doing business as American Radiator, as a full-time delivery driver from 2014 until June 7, 2021, when the

employer discharged him from the employment. On June 3, 2021, the claimant was operating the employer's marked delivery truck when he rear-ended another motorist at an intersection. The collision caused more than \$10,000.00 in damage to the employer's vehicle and caused damage to the other vehicle. At the time of the collision, the other motorist was recovering from donating a kidney, which added medical expenses to the claim against the employer's insurance policy. A law enforcement officer issued a citation to the claimant for Failure to Stop in Assured Clear Distance in violation of Iowa Code section 321.285. The other motorist was not cited. The claimant promptly notified the employer of the collision. The claimant promptly tendered a guilty plea to the offense and was fined. This collision and prior concerns prompted the employer's liability insurance carrier to recommend the employer no longer have the claimant operate the employer's vehicles.

In 2017, the claimant had caused a collision when he backed the employer's delivery truck into a car parked on the employer's property.

In making the decision to discharge the claimant from the employment, the employer considered the claimant's earlier unsafe operation of the employer's marked vehicle and associated warnings. In July 2020, the employer issued a written final warning to the claimant after the employer's GPS system sent 18 automatic messages to alert the employer to the claimant's speeding in the employer's vehicle 18 times on the same day. These included an alert that the claimant was going 82 miles per hour and 90 miles per hour on two interstate highways with a 70 mile per hour posted speed limit. The claimant asserts he was not feeling well on the day in question, fell behind in deliveries, and repeatedly violated the speed limit so that he could get back to the home base by 5:00 p.m. The claimant was aware that the employer would reopen its storage facility after 5:00 p.m. to provide access as needed. The employer issued no directive to the claimant that would encourage or approve speeding offenses while operating the employer's delivery truck. Indeed, the employer had provided the claimant with work rules that specifically required him to follow the law, including posted speed limits. The July 2020 incidents prompted the employer to remove the claimant from route deliveries and to assign the claimant to deliver only in the Des Moines metropolitan area and sometimes in Ames. In making this decision, the employer considered additional incidents wherein the claimant drove at excessive speed and violated the speed limit while operating the employer's marked delivery truck.

## **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 96.5(2)(a) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 Iowa Administrative Code rule 871-24.32(4).

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 Ct. 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.*

The evidence in the record establishes a pattern of conduct that indicates a willful and wanton disregard of the employer's interests. The claimant made statements during the hearing that significantly undermined his credibility. These included assertions that he was a cautious driver, despite overwhelming evidence to the contrary. The claimant asserted and then backtracked on the notion that his many speeding incidents did not count because he was not caught and cited. The claimant spun a tale regarding how he was allegedly serving the employer's interests at the time he triggered 18 speeding alerts in a single day in July 2020. The claimant's marked tendency to spin the truth makes it difficult to give weight to the claimant's testimony regarding alleged mitigating circumstances surrounding the June 3, 2021 collision. Irrefutable facts tell a different story. The claimant rear-ended a vehicle in the employer's delivery vehicle. The claimant was cited by law enforcement with unsafe operation of the vehicle. The claimant plead guilty to the offense. The claimant had on many prior occasions operated the employer's vehicle in an unsafe manner. The claimant is disqualified for benefits until the claimant has worked in and been paid wages for insured work equal to 10 times the claimant's weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

**DECISION:**

The August 6, 2021, reference 01, decision is affirmed. The claimant was discharged for misconduct in connection with the employment. The claimant is disqualified for benefits until the claimant has worked in and been paid wages for insured work equal to 10 times the claimant's weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.



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James E. Timberland  
Administrative Law Judge

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October 4, 2021  
Decision Dated and Mailed

jet/kmj