

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ZWIERS, KENNETH, M

Claimant

CRST VAN EXPEDITED INC

Employer

APPEAL NO. 11A-UI-05311-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/20/11

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Kenneth Zwiars filed a timely appeal from the April 14, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 16, 2011. The claimant failed to respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate in the hearing. Sandy Matt, Human Resources Specialist, 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: Kenneth Zwiars was employed by CRST Van Expedited, Inc., as a full-time over-the-road truck driver from 2008 until January 27, 2011, when Scott Nelson, Fleet Manager, discharged him from the employment. Mr. Nelson was Mr. Zwiars' immediate supervisor. The final incident that triggered the discharge occurred on January 23, 2011. On that day, Mr. Zwiars was operating his assigned semi tractor-trailer in the vicinity of a customer's facility. At the corner, separating the customer's property from the street was a temporary fence. Mr. Zwiars noted the temporary fence and that it has been partially torn down, apparently from other semi drivers coming into contact with it as they negotiated the same corner. When Mr. Zwiars turned the corner, the rear wheels of his trailer came into contact with chain link mesh from the fence. The chain link mesh was lying in the street but was still attached to the rest of the temporary fence. Mr. Zwiars looked back as he turned the corner and saw that a couple of the temporary fence posts had been pulled down as a result of the chain link mesh getting caught in his rear tires. Mr. Zwiars made contact with the customer's guard shack and was told that the fence was frequently hit by drivers negotiating the corner. Mr. Zwiars also promptly reported the incident to the employer's safety department, dispatch department, and maintenance department. There was no damage to the employer's truck or the trailer.

On June 25, 2010, Mr. Zwiers had turned too tight while he was backing his truck under a trailer and brought the faring of the truck in contact with the trailer. Mr. Zwiers discussed the incident with the employer's safety department and was told the incident was a common occurrence and no big deal. On July 9, 2010, Mr. Zwiers again brought the faring of the tractor into contact with a trailer as he was backing under it. Mr. Zwiers stopped his truck as soon as he heard the faring come into contact with the trailer. There was no damage to the tractor or trailer. Mr. Zwiers reported the incident to the safety department at his co-drivers' request. After that incident, the employer had Mr. Zwiers participate in a defensive driving class. On September 7, 2010, Mr. Zwiers backed his truck into another truck at a truck stop. After that incident, the employer had Mr. Zwiers go on a safety drive with a member of the safety department to demonstrate safe operation of the employer's equipment.

REASONING AND CONCLUSIONS OF LAW:

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 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 negligence, carelessness, or intentional disregard of the employer's interests in connection with the final incident on January 23, 2011 that prompted the discharge. The weight of the evidence establishes that Mr. Zwiers' truck pulled a portion of the temporary fence down, but only because chain link mesh from the fence had been left lying in the street where Mr. Zwiers could not avoid it. Because the evidence fails to establish negligence, carelessness, or intentional wrongdoing in connection with the final incident, the administrative law judge concludes that the evidence fails to establish a current act of misconduct. Because the evidence fails to establish a current act of misconduct, the administrative law judge concludes that Mr. Zwiers was discharged for no disqualifying reason. Mr. Zwiers is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged. Because the evidence fails to establish a current act of misconduct, the administrative law judge need not further consider the prior incidents or rule on whether they involved negligence, carelessness or intentional wrongdoing.

DECISION:

The Agency representative's April 14, 2011, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for unemployment benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs