

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PAUL J BOROVAC

Claimant

APPEAL NO: 18A-UI-09640-TN

**ADMINISTRATIVE LAW JUDGE
DECISION**

RAILCREW XPRESS LLC

Employer

OC: 08/26/18

Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge

STATEMENT OF THE CASE:

Paul J. Borovac, the claimant filed a timely appeal from a representative's unemployment insurance decision dated September 17, 2018, (reference 01) which denied unemployment insurance benefits finding that the claimant was discharged from work on August 31, 2018 for failure to follow instructions in the performance of his job. After due notice was provided, an in-person hearing was held on October 19, 2018 and November 9, 2018. Claimant participated. Participating as a witness for the claimant was Mr. Jerri Collins, former employee. Claimant was represented by Mr. Michael J. Tulis, Attorney at Law, Iowa Legal Aid. Mr. Tulis, the claimant and the claimant's witness appeared personally at the area claims center located in Council Bluffs, Iowa. Employer participated by Ms. Tara Johnson, Director of Human Resources. Ms. Johnson participated by telephone. Employer's Exhibit 20 was admitted into the hearing record. Employer's Exhibits 1 through 19 were taken into the record during October 19, 2018. Also admitted as an Exhibit was a CD of "Drive Cam" video depictions of the claimant's last three driving events that resulted in disciplinary action and/or termination.

ISSUE:

The issue is whether the evidence in the record establishes intentional work-connected misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Paul J. Borovac began employment with Railcrew Xpress, LLC on March 30, 2015. Mr. Borovac worked as a full-time driver, transporting Railcrew members by Railcrew Xpress, LLC van to and from work locations. Claimant was paid by the hour and had been supervised by Ms. Tari Brown, however his immediate supervisor at the time of termination was Ms. Susan Ibsen.

Mr. Borovac was discharged on August 31, 2018 based upon the employer's belief that Mr. Borovac had violated company safety rules by failing to adequately stop the company van that he was driving on August 26, 2018 at a stop sign at a cross-walk. The employer concluded that the claimant had intentionally violated the company's safety rule based upon depictions on

a video recording device installed on the company vehicle that Mr. Borovac was driving. The device records the driver's actions, and has accompanying views of the road and surroundings nearby. The "Drive CAM" system is activated by speed, sharp turns, or by the sudden, or strong application of the vehicle's brakes. The depictions recorded on the system are later retrieved by a third party who reviews the images, and then forwards them to the employer if there is a question of a potential safety violation.

The company's discipline and discharge procedures are part of the agreement between the national teamsters, general driver's and helpers local number 554 and Railcrew Xpress, LLC. Under the terms of the agreement, disciplinary actions are progressive and are to include an oral reprimand, a written reprimand, and suspension before an employee is subject to discharge. The Agreement calls for disciplinary actions given to employees to be forwarded to the Union. The letter of reprimand must be issued to the employee and forwarded to the Union Steward no later than five days following the employer's knowledge of a violation. Warnings are not subject to union grievance procedures. Employees can file grievances if they are suspended or discharged after completing their probationary period of employment. Under the Agreement, the employer also retains the right to terminate for "just cause" without following progressive discipline. Disciplinary actions remain active for a period of six months. Violations, such as smoking in company vehicles, seatbelt violations, texting while driving, speeding more than ten miles above the speed limit, preventable accidents, motor vehicle violations, failure to report an accident, or harassment and discrimination violations, remain active and can be used for later progressive discipline.

During the course of his employment, Mr. Borovac had been given a number of warnings about driving and other issues. Mr. Borovac had verbal warnings that remained in effect at the time of the final incident. In the past, the claimant had been given a final written warning for failure to stop at a stop sign on January 31, 2017, written warnings on February 10, 2017, and March 15, 2017 for distracted driving, a warning on May 4, 2017 for smoking and a warning on August 8, 2017 for speeding.

A final series of warnings for infractions lead to Mr. Borovac's termination on August 31, 2018. He was given a final warning and a one day suspension on March 19, 2018 for failure to stop at a stop light. A written warning was given on May 8, 2018 for cell phone use and was given another final written warning on July 3, 2018, for failure to properly notify the employer that he would be absent.

The final incident that caused Mr. Borovac's termination took place and was recorded on August 26, 2018. The "Drive-Cam" camera was activated on the vehicle as Mr. Borovac operated the company's railcrew van alone. The recording camera was activated when he applied the brakes as he approached a cross-walk stop sign. The depiction shows the van coming to a brief stop a short distance beyond the stop sign and into the cross-walk area. The surveillance video was reviewed by a third-party and forwarded back to the company as a potential safety violation. Railcrew Xpress, LLC management reviewed the short video depiction and concluded that the claimant had either not stopped, or had not stopped at or before the stop sign, and this was a safety violation. The employer made no inquiry to the claimant about the matter and discharged the claimant by letter.

During the final incident, as he approached the cross-walk and stop sign, the claimant attempted to apply the vehicle's brakes within sufficient time and distance to stop the vehicle. The claimant's foot initially slipped off the brake pedal because his shoes were wet and muddy due to weather conditions that day and he had to depress the pedal a second time to stop. Mr. Borovac denies intentionally violating the company's safety expectations and maintains that

his failure to stop at or before the stop sign was not intentional but due to factors beyond his control.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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 establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the

carelessness must actually indicate a “wrongful intent” to be disqualifying in nature. See *Newman v. Iowa Dep’t of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp’t Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation.

Although the claimant’s employment history with the company shows a somewhat blatant disregard for the employer’s expectations and policies, the evidence in the record does not establish that the claimant’s conduct during the final incident rose to the level of intentional work-connected misconduct sufficient to warrant the denial of unemployment insurance benefits. The video depictions of the final incident show that the railcrew van did come to a stop a short distance from the stop sign and into the cross-walk area. The claimant has supplied a reasonable explanation of his conduct that coincides with the depictions on the on-board camera that explains his failure to stop sooner. The claimant’s testimony that his foot slipped because it was slick and muddy is credible and not inherently improbable.

The question before the administrative law judge is not whether the employer had a right to discharge Mr. Borovac for this reason, but whether the discharge disqualifies the claimant for unemployment insurance benefits. While the decision to terminate Mr. Borovac may have been a sound decision from a management viewpoint, the evidence in the record does not establish intentional misconduct on the part of the claimant at the time of the final incident sufficient to warrant the denial of unemployment insurance benefits. Accordingly, unemployment insurance benefits are allowed, providing that he meets all other eligibility requirements of Iowa law.

DECISION:

The representative’s unemployment insurance decision dated September 17, 2018, reference 01 is reversed. Claimant was discharged under non-disqualifying conditions. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

Terry P. Nice
Administrative Law Judge

Decision Dated and Mailed

tn/scn