

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

LUCAS STEPHENS

Claimant

APPEAL NO. 18A-UI-11461-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FEDERAL EXPRESS CORP

Employer

OC: 10/28/18

Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 14, 2018, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on September 28, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on December 10, 2018. Claimant Lucas Stephens did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Barb Hamilton of Equifax represented the employer and presented testimony through Kady Egan. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant, which record reflects that no benefits have been disbursed to the claimant in connection with the original claim that was effective October 28, 2018. Exhibits 1 through 4 were received into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Lucas Stephens was employed by Federal Express Corporation (FedEx) as a full-time courier from 2012 until September 28, 2018, when Operations Manager Kady Egan discharged him from the employment. Operations Manager Rohan Scholar was Mr. Stephens' immediate supervisor. The final incident that triggered the discharge occurred on September 20, 2018 a Meredith terminal in Des Moines. As Mr. Stephens pulled away from the terminal and the customer's parking lot, he misjudged the distance between his truck and a gate during a turn. Mr. Stephens struck and damaged the gate.

The next most recent incident that factored in the discharge concerned Mr. Stephens' alleged use of profanity on April 20, 2018, while corresponding in writing with a coworker. The employer

witness, Ms. Egan, issued a written reprimand to Mr. Stephens in connection with the matter, but does not know what Mr. Stephens' allegedly wrote.

The next most recent incident that factored in the discharge occurred on March 20, 2018, when Mr. Stephens drove his truck up onto a curb and into a landscaped area to get around a parked vehicle. Mr. Stephens' actions caused damage to a landscaped area. Ms. Egan issued a written reprimand to Mr. Stephens in connection with the incident.

Under the employer's written progressive discipline policy, an employee who incurs three "performance reminders" within a 12-month period is subject to discharge from the employment. Ms. Egan invoked this provision of the progressive discipline policy when discharging Mr. Egan from the employment.

Reprimands that Ms. Egan issued to Mr. Stephens in connection with the above-referenced matters reference "Preventable Occurrences" from 2014, 2016 and 2017, but the employer witness, Ms. Egan, lacks any information concerning those matters.

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 Iowa Administrative Code rule 871-24.32(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).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. *Warrell v. Iowa Dept. of Job Service*, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority. *Deever v. Hawkeye Window Cleaning, Inc.* 447 N.W.2d 418 (Iowa Ct. App. 1989). The question of whether the use of improper language in the workplace is misconduct is nearly always a fact question. It must be considered with other relevant factors, including the context in which it is said, and the general work environment. See *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa Ct. App. 1990).

The weight of the evidence in the record establishes a discharge for no disqualifying reason. The weight of the evidence in the record establishes that Mr. Stephens operated the employer's truck in a careless manner in connection with September 20, 2018 final incident that triggered the discharge. However, in that final instance, the carelessness involved misjudging a distance and not ascertaining the distance between the truck and the gate, rather than more egregious conduct. The weight of the evidence establishes that Mr. Stephens also operated the employer's truck in a careless manner on March 20, 2018. That earlier instance was more egregious than the final incident, in that Mr. Stephens elected to drive the truck up onto the curb and into the landscaped area. These two incidents are insufficient to establish a *pattern* of conduct indicating a willful and *wanton* disregard of the employer's interests. The employer presented insufficient evidence to prove any other incidents of careless and/or negligent operation of the employer's equipment. The employer presented insufficient evidence to prove that Mr. Stephens used profanity or offensive language in a confrontational, disrespectful, or

name-calling context on March 20, 2018. The employer could not recall what Mr. Stephens was alleged to have written to the colleague. The evidence establishes no other similar incidents.

While the decision to discharge the claimant from the at-will employment was within the employer's discretion, the evidence does not establish a discharge for misconduct in connection with the employment that would disqualify the claimant for unemployment insurance benefits. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The November 14, 2018, reference 01, decision is affirmed. The claimant was discharged on September 28, 2018 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