

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**SHEAN GILKEY**  
Claimant

**AMERICAN TIRE DISTRIBUTORS INC**  
Employer

**APPEAL 20A-UI-01141-AW-T**  
**ADMINISTRATIVE LAW JUDGE**  
**DECISION**

**OC: 01/12/20**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Claimant filed an appeal from the February 3, 2020 (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was held on February 24, 2020, at 8:00 a.m. Claimant participated. Employer participated through Michael Matthews, Director of Distribution Excellence. Claimant's Exhibit A was admitted.

**ISSUE:**

Whether claimant's separation was a discharge for disqualifying job-related misconduct.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time driver from July 22, 2019 until his employment with American Tire Distributors, Inc. ended on January 23, 2020. Employer has a policy that states three traffic violations within three years will result in revocation of the employee's driving privileges. The policy is included in the employee handbook, to which claimant had access. When a driver has three traffic violations within three years, employer sometimes allows the driver to work in the warehouse until the oldest of the three violations expire.

On January 7, 2020, claimant received a speeding ticket while driving a company vehicle. Claimant notified employer of the ticket immediately. On January 13, 2020, employer suspended claimant without pay pending an investigation. Employer obtained claimant's driving record and learned claimant received a ticket for speeding on February 3, 2018 and a ticket for failure to stop on June 6, 2019; these tickets predated claimant's employment with American Tire Distributors, Inc. Employer did not have work available for claimant in the warehouse. Other drivers with their driving privileges revoked were working in the warehouse at the time.

On January 23, 2020, employer discharged claimant for violating the policy against three traffic violations within three years. Claimant did not know his job was in jeopardy. Claimant did not know that traffic violations predating his employment would be counted towards the three violations under employer's policy. Claimant did not know that he would be discharged for

accruing a traffic violation. Claimant had a prior warning for using his cell phone while driving a company vehicle, but no prior warnings for traffic violations.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant was discharged for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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 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:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, 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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r. 871-24.32(8) provides:

(8) *Past acts of misconduct*. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be

based on such past act or acts. The termination of employment must be based on a current act.

A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. 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." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). A failure in job performance is not misconduct unless it is intentional. *Huntoon*, supra; *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

Employer discharged claimant because he received a speeding ticket while driving a company vehicle and did not have work available for claimant in its warehouse when it revoked claimant's driving privileges. There is no evidence that claimant willfully or wantonly disregarded the standards of behavior the employer had a right to expect of him. Claimant's speeding ticket was the result of ordinary negligence. Claimant had no prior warnings for traffic violations. Claimant's warning for using his cellular phone was not similar to a warning for a traffic violation. Other drivers with three traffic violations were not discharged.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. Employer has not met its burden of proving disqualifying, job-related misconduct. Therefore, claimant was discharged for no disqualifying reason. Furthermore, to the extent that claimant was subjected to disparate discipline, his conduct cannot support a disqualification from unemployment benefits. Benefits are allowed, provided claimant is otherwise eligible.

**DECISION:**

The February 3, 2020 (reference 01) unemployment insurance decision is reversed. Claimant was discharged for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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Decision Dated and Mailed

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