

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DEAN KINSEY**  
Claimant

**APPEAL NO. 09A-UI-10929-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CRST VAN EXPEDITED INC**  
Employer

**OC: 05/03/09**  
**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 July 22, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 14, 2009. Claimant Dean Kinsey participated. Lisa Oetken, Human Resources Generalist, represented the employer. Exhibit One was received into evidence.

**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: Dean Kinsey was employed by CRST Van Expedited as a full-time over-the-road truck driver from April 30, 2008 until June 5, 2009, when Charm White, Fleet Manager, discharged him from the employment. Ms. White was Mr. Kinsey's immediate supervisor. The employer required that Mr. Kinsey work as a driving team with a co-driver. Mr. Kinsey last performed work for the employer on May 5, 2009. Mr. Kinsey then went on a five-day scheduled time off period. Mr. Kinsey then commenced an approved period of vacation that ended on May 15, 2009.

Mr. Kinsey was then off work pursuant a family emergency. Mr. Kinsey's uncle was hospitalized in Pennsylvania and not expected to live. Mr. Kinsey resided in Florida, as did his elderly parents. Mr. Kinsey drove his elderly parents from Florida to Pennsylvania and then back to Florida. Mr. Kinsey had his mother notify the employer of his need to be off work for this purpose. Ms. White approved the time off, based on the mother's representation that Mr. Kinsey would be available to return to work on May 27.

Mr. Kinsey made no contact with Ms. White on May 27 or 28. On May 28, Ms. White left a message for Mr. Kinsey. On May 29, Mr. Kinsey called Ms. White back. Ms. White provided Mr. Kinsey with contact information for potential co-drivers and directed him to contact the people on the list to find his own co-driver. Mr. Kinsey called the numbers on the list and left messages, but no one called him back. On June 2 and 3, Ms. White provided contact

information for a few more potential drivers. Mr. Kinsey called the people on the list, left messages, and again received no calls back.

Ms. White told Mr. Kinsey that he had to find his own co-driver and be on the road by June 5 or he would be discharged from the employment. Mr. Kinsey was unable to find a co-driver in that time-frame. On June 5, Ms. White notified Mr. Kinsey that he was discharged from the employment.

## **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 employer elected not to present any testimony from Ms. White or any of the CRST drivers Ms. White directed Mr. Kinsey to contact. The employer's witness had no contact whatsoever with Mr. Kinsey during the course of his employment. Mr. Kinsey testified to the contact he had with the employer and to his unsuccessful efforts to locate a co-driver in the time allotted by his supervisor. The employer has failed to present testimony from firsthand witnesses to events that led to the separation to rebut the testimony provided by Mr. Kinsey. The weight of the evidence indicates a discharge from the employment on June 5, 2009. While Mr. Kinsey failed to contact the employer on May 27 and 28, these absences were not the basis for the discharge. The basis for the discharge was his inability to find a co-driver from the list the employer had provided. The employer has failed to provide evidence indicating that Mr. Kinsey acted in bad faith or used anything other than his best efforts in attempting to locate a co-driver. The evidence fails to establish misconduct on the part of Mr. Kinsey.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Kinsey was discharged for no disqualifying reason. Accordingly, Mr. Kinsey is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Kinsey.

**DECISION:**

The Agency representative's July 22, 2009, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs