IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

PETER HERRIG Claimant **FEDERAL EXPRESS CORP** Employer	**APPEAL 16A-UI-08616-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/26/16** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the July 29, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 25, 2016. Claimant participated. Employer participated through hearing representative Thomas Kuiper and operations manager Robert Ahl. Employer Exhibit One was admitted into evidence with no objection. Official notice was taken, with no objection, of the administrative record of the fact-finding documents regarding whether the employer participated in the fact-finding interview.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a courier – swing driver from October 24, 1985, and was separated from employment on June 23, 2016, when he was discharged.

The employer has a written policy that failure to properly secure a vehicle from movement is a serious violation that may result in discharge upon one occurrence or at a minimum a warning letter will be issued. Employer Exhibit One. Couriers are taught defensive driver training, which includes securing a vehicle from movement. Claimant received the training. The employer also has a disciplinary policy that if an employee receives three warning letters within one year, they are discharged; it does not matter the reason for the warning. Claimant was aware of the policy.

On June 18, 2016, claimant was filling in for another employee. Claimant was driving an employer vehicle and parked on a hill for a customer delivery. Claimant's vehicle was parked facing up the hill. Claimant stopped the vehicle, put the vehicle in park, and engaged the parking/emergency break. Claimant turned the wheels toward the curb, as opposed to away from the curb, so that if there was a rollaway it would not roll into the street. Claimant took his seatbelt off and removed the keys. Claimant then got up and the truck was not rolling. When claimant got to the back of the vehicle (still inside the vehicle) and opened the side door, the vehicle started to roll. Claimant tried to get back to the front of the vehicle to stop it. The vehicle rolled backwards into a tree; the tree stopped the vehicle. The parking/emergency brake was still engaged and the vehicle was still in park when claimant got to the front of the vehicle. Claimant then called Mr. Ahl. Claimant was shook-up because he thought he could lose his job because of two prior warning letters and if the employer determined this was preventable, he could get another warning letter. When claimant contacted Mr. Ahl, Mr. Ahl asked if claimant was ok to finish his route. Claimant was able to finish his route; over 100 more miles. No one from the employer went to the area to inspect what happened at the time of the incident. Claimant finished his route. When claimant's vehicle rolled back into the tree, it caused damage to the tree and the vehicle.

On June 20, 2016, Mr. Ahl, Mr. Ahl's supervisor, and claimant went to the site of the incident. Claimant walked through what happened, including how he turned the wheels. Claimant stated he had the parking/emergency brake engaged and the vehicle in park. On June 20, 2016, claimant was suspended by the employer.

On June 21, 2016, the employer had a mechanic investigate the vehicle. The mechanic stated that the parking/emergency brake was in good working order and the vehicle would not have moved if the parking/emergency brake was engaged or the vehicle was in park. The employer determined that if claimant had turned the wheels away from the curb, it would have stopped the vehicle.

Claimant was then discharged on June 23, 2016. Claimant testified he did not intend to have the accident on June 18, 2016. Claimant knows how to secure a vehicle and has been an excellent driver. Claimant always engages the parking/emergency brake and puts the vehicle in park when he parks the employer's vehicle.

Claimant had no prior warnings for rollaways. Claimant had prior warning letters on August 6, 2015 for putting improper fuel in a vehicle and in February 2016 for leaving a container of urine in the vehicle.

REASONING AND CONCLUSIONS OF LAW:

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

It is the duty of an administrative law judge and the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a

witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibit submitted. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events.

Iowa Code § 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:
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> 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.

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).

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.

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." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986). 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).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. 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.

Claimant's final act that resulted in discharge was when the employer's vehicle rolled back into a tree, causing damage to the tree and the employer's vehicle. The employer's argument that the mechanic that inspected the vehicle on June 21, 2016, found the vehicle would not have moved if the parking/emergency brake was engaged or if the vehicle was in park is not persuasive. Claimant provided credible, first-hand testimony, that he engaged the parking/emergency brake and placed the vehicle in park. Furthermore, claimant credibly testified that he always engaged the parking/emergency brake when he parked the employer's vehicle. It is also not persuasive that the employer had determined that if claimant would have turned the wheels away from the curb, it would have stopped the vehicle. Claimant provided reasonable testimony that he turned the wheels toward the curb to prevent the vehicle from rolling into the street if there was a rollaway.

"[T]he definition of misconduct requires more than a 'disregard' it requires a '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.'" *Greenwell v. E.A.B. and Professional Transportation, Inc.*, No. 15-0154 (Iowa Ct. App. filed March 23, 2016) (citing Iowa Admin. Code r. 871-24.32(1)(a)) (emphasis in original). "Reoccurring acts of negligence by an employee would probably be described by most employers as in disregard of their interests." *Id*. "The misconduct legal standard requires more than reoccurring acts of negligence in disregard of the employer's interests." *Id*. "[T]he acts [should constitute] an 'intentional and substantial' disregard of the employer's interests[.]"*Id*. The employer failed to show that on June 18, 2016, claimant's conduct was "an 'intentional and substantial' disregard of the employer's interests[.]" *Id*. Benefits are allowed.

Furthermore, the conduct for which claimant was discharged was merely an isolated incident of poor judgment and inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. 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. A warning for improper fuel in a vehicle and leaving a container of urine in a vehicle is not similar to not properly securing a vehicle from movement and the employer's simple accrual of a certain number of warnings counting towards discharge does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits. Benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The July 29, 2016, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/pjs