IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ANTONIO FLESHNER
Claimant

PREFERRED CARTAGE SVC INC
Employer

APPEAL 21A-UI-23746-SN-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/06/20
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Antonio Fleshner, filed an appeal from the October 22, 2021, (reference 01) unemployment insurance decision that denied benefits based upon the conclusion he was discharged due to misconduct. The parties were properly notified of the hearing. A telephone hearing was held on December 15, 2021. The claimant participated and testified. The employer did not participate.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant worked for the employer as a shag driver from June 1, 2021, until September 24, 2021, when he was discharged.

As a shag driver, the claimant was responsible for moving trailers in the employer's yard for a variety of reasons. He was not required to have a commercial driver's license to perform this role. The claimant did not remember the name of his immediate supervisor. This individual will be referenced by his position throughout this decision.

The employer has an employee manual. He is unaware if the employer has a policy regarding whether a certain amount of accidents warrants discipline up to and including termination. The claimant received a copy of the employee manual.

In July 2021, the claimant pushed his rear-view mirror on the driver's side forward while he was moving a trailer in the yard. This did not result in damage to the mirror. However, when the claimant adjusted the mirror back to its original position, this cracked the mirror. The claimant's supervisor wrote up a description of the accident but did not issue him any discipline regarding this accident.

In August 2021, the claimant was instructed to pull a trailer forward, so that a flat tire on the back of it could be replaced. Another trailer had been parked next to this trailer which prevented the mechanic from replacing the tire in its current location. The trailer had wide tires on the front and back of it, rather than having two wheels like many trailers do. While the claimant was pulling this trailer out, it leaned into the trailer parked next to it due to having one flat tire on the rear. This created superficial damage at the top of the trailer that was difficult to see during the day due to the way the sun hit the metal. Nevertheless, the claimant reported this accident to management. The following day, the claimant's team lead (name unknown) wrote up a description of the accident but did not issue him any discipline. The team lead suggested that if he was asked to do a similar haul in the future, that he should pull the trailer that was too close with the good tires, rather than a trailer with a known blown tire.

On September 21, 2021, the claimant was asked to haul an old trailer that remained in the yard. The trailer did not have hooks for the doors to latch, so the employer's staff had attempted to secure those doors with bungie cords. The bungie cords did not remain taut during the haul, which resulted in one of the doors coming open enough to be snagged on the edge of a dumpster. This pulled the door off its hinges. The claimant informed his supervisor about the accident.

On September 22, 2021, the claimant's supervisor informed him he would be suspended until September 24, 2021. His supervisor reminded the claimant that since he had requested off September 24, 2021, September 25, 2021, and September 26, 2021, that he would speak with him on September 27, 2021, about the outcome of the suspension.

On September 24, 2021, the claimant noticed on his cell phone that he had received payment from the employer. The claimant called the corporate office to inquire about why he had already received his paycheck for the pay period. The representative on the phone told him he had been terminated. The claimant then called his supervisor. The claimant's supervisor then informed him that he had been terminated. The supervisor said, "I'm sick of you going over my head to corporate." The claimant does not believe his call to corporate was part of the decision to terminate him because he had already been issued his final check.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the employer has failed to meet its burden that the claimant engaged in work-related misconduct.

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.

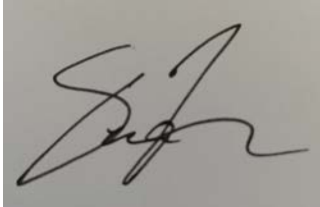
This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *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).

To show the claimant is disqualified from benefits, the employer has the burden to show the conduct that gave rise to his termination must be based on a "deliberate" act or omission. While the claimant had several accidents in a short amount of time, there is nothing in the record to suggest the claimant performed these actions with deliberate disregard to the employer's interests. The record merely shows the claimant had regrettable accidents that resulted in damage to the employer's property. Such a record has been found to be insufficient in analogous cases. *See Fairfield Toyota, Inc. v. Bruegge*, 449 N.W.2d 395 (Iowa Ct. App. 1989). In fact, the claimant reported damage regarding the second accident, even though it was difficult to see. Given this record, the administrative law judge has determined that benefits should be granted.

DECISION:

The October 22, 2021, (reference 01) unemployment insurance decision is reversed. The employer has not met its burden to show the claimant was terminated for disqualifying misconduct. Benefits are granted, provided the claimant is otherwise eligible.



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Sean M. Nelson
Administrative Law Judge
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January 20, 2022________
Decision Dated and Mailed

smn/scn