

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JON M MOORE
Claimant

APPEAL NO. 12A-UI-14429-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PANAMA TRANSFER INC
Employer

OC: 11/04/12
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 30, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on January 9, 2013. Claimant Jon Moore was not available at the number he had provided for the hearing and did not participate. The administrative law judge made two attempts to reach Mr. Moore for the hearing and left an appropriate message each time. Heath Richards, Safety Director, represented the employer.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jon Moore was employed by Panama Transfer as a full-time day route driver from November 5, 2012 until November 9, 2012, when Heath Richards, Safety Director, discharged him from the employment. Driver Manager Dave Henning carried out the discharge at Mr. Richards' direction.

It is the employer's practice to have a Driver Manager ride with new hires during the first week and a half of the employment. On November 8, 2012, Driver Manager Dave Henning was riding with Mr. Moore as Mr. Moore operated the employer's tractor-trailer unit. Mr. Moore approached a four-way stop intersection from the south. Mr. Moore needed to make a left turn at the four-way stop to head west. The intersection included a diagonal road that would allow traffic *coming from the west* to bypass the four-way stop *to turn and head south*. Rather than proceed to the four-way stop intersection to make his left turn and head west, Mr. Moore started to make an *illegal* left turn, *going the wrong way*, onto the diagonal that was only for the traffic coming from the west and turning south. Had there been any vehicles coming to the intersection from the west at that moment, Mr. Moore's illegal turn would likely have resulted in a collision for which Mr. Moore would be responsible and the employer liable. Driver Manager Dave Henning asked Mr. Moore what he was doing. Mr. Moore answered that he was just

trying to save time. When Mr. Henning told Mr. Moore that he had to use the four-way stop intersection, Mr. Moore jerked the truck back toward the four-way stop. Mr. Moore then did not stop at the intersection. Mr. Moore *rolled over* the stop sign he was supposed to heed, rolled into the intersection, and turned left to head west. In the process of disobeying the stop sign to venture into the intersection, Mr. Moore cut off a pickup with a livestock trailer that had legally entered the intersection from the north, nearly colliding with that oncoming vehicle.

Mr. Henning had a front-row seat on the near miss and directed Mr. Moore to stop the truck. Mr. Moore said he had not seen the other vehicle. Mr. Moore had not seen the other vehicle because he had illegally entered the intersection rather than obeying the stop sign. Mr. Moore did not acknowledge the seriousness of the multiple traffic infractions he had just committed or the danger he had just created through his intentionally unsafe operation of the employer's tractor-trailer. Mr. Moore did not demonstrate any remorse for cutting off the other vehicle and nearly causing an accident. Mr. Henning immediately reported the incident to Safety Director Richards. Mr. Richards directed Driver Manager Henning to take over operation of the tractor-trailer. Later that evening, Mr. Richards directed Mr. Henning to discharge Mr. Moore from the employment when he appeared for work the next morning. The employer had concluded that Mr. Moore presented an unacceptable safety risk to the motoring public and an unacceptable liability issue for the employer through his unsafe operation of the employer's rig.

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 evidence in the record establishes that the employer discharged Mr. Moore from the employment in response to Mr. Moore's intentionally reckless operation of the employer's tractor-trailer. The driver manager witnessed Mr. Moore intentionally violate multiple rules of the road. Mr. Moore's reckless operation of the employer's tractor-trailer placed the motoring public at risk of serious injury or death and placed the employer at risk of substantial liability. Mr. Moore's conduct indicated both a willful and wanton disregard of the employer's interest in safe and legal operation of its equipment. Mr. Moore's conduct constituted misconduct in connection with the employment that disqualifies him for unemployment insurance benefits. Mr. Moore is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will

remand the matter to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

DECISION:

The Agency representative's November 30, 2012, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

This matter is remanded to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs