

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PHILLIP E BAUMAN
Claimant

APPEAL NO. 08A-UI-10957-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CRST VAN EXPEDITED INC
Employer

OC: 10/19/08 R: 12
Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge for Misconduct
Section 96.3(7) – Recovery of Overpayments

STATEMENT OF THE CASE:

CRST Van Expedited, Inc. (CRST) filed an appeal from a representative's decision dated November 14, 2008, reference 01, which held that no disqualification would be imposed regarding Phillip Bauman's separation from employment. After due notice was issued, a hearing was held by telephone on December 8, 2008. Mr. Bauman participated personally. The employer participated by Jim Barnes, Director of Human Resources. Exhibits One, Two, and Three were admitted on the employer's behalf.

ISSUE:

At issue in this matter is whether Mr. Bauman was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Bauman was employed by CRST from January 24 until July 2, 2008 as an over-the-road driver. He became a co-driver with Kirk Aubuchon on March 17. The two were discharged for fighting on the job on June 25.

Mr. Bauman and Mr. Aubuchon were in Florida on June 25. There was going to be a delay in picking up their next load and, therefore, they decided to go to a truck stop. Mr. Bauman went to sleep and awoke approximately two hours later to find they were still on the road. He and Mr. Aubuchon disagree as to what triggered the physical altercation that occurred while they were still on the road. Mr. Bauman indicated that Mr. Aubuchon "backhanded" him because he commented on how far out of the way he had driven to find a truck stop. Mr. Aubuchon indicated that Mr. Bauman punched him after he inadvertently struck Mr. Bauman while trying to move him so he could see the side mirrors. Mr. Bauman acknowledged that he struck Mr. Aubuchon at least three times while Mr. Aubuchon was still driving and attempting to pull over.

Mr. Bauman sent text messages to the employer at 8:29 and 8:34 a.m. Neither message indicated that Mr. Aubuchon was yelling and swearing at him and threatening to assault him. After the incident was reported to management, Mr. Bauman was sent to Oklahoma City where he provided a written statement as to what occurred. Both parties were discharged as a result of the incident.

Mr. Bauman filed a claim for job insurance benefits effective October 19, 2008. He has received a total of \$1,211.00 in benefits since filing the claim.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Mr. Bauman was discharged for fighting on the job. It is clear that Mr. Aubuchon touched him first, either intentionally or inadvertently. From the testimony, it does not appear that Mr. Aubuchon was continuing to hit Mr. Bauman after the first blow. Therefore, Mr. Bauman was not striking Mr. Aubuchon to avoid further blows. The fact that one has been hit does not always justify hitting back. Mr. Aubuchon was using at least one hand to steer the vehicle whereas Mr. Bauman had both hands free. It seems unlikely Mr. Aubuchon would have continued to try to beat him up while driving the vehicle.

Mr. Bauman's conduct in returning the blows while Mr. Aubuchon was driving was clearly contrary to the employer's best interests. His conduct had the potential of causing Mr. Aubuchon to lose control of the vehicle, thereby endangering the safety of others on the road. He did not merely strike Mr. Aubuchon once, he struck him three times. Had he lost control of the vehicle and struck another vehicle, the employer would have potential liability for damages. The administrative law judge concludes that Mr. Bauman's conduct in fighting with Mr. Aubuchon while Mr. Aubuchon was driving constituted a substantial disregard of the standards the employer had the right to expect. For the reasons cited herein, it is concluded that misconduct has been established and benefits are denied.

Mr. Bauman has received benefits since filing his claim. As a general rule, an overpayment of job insurance benefits must be repaid. Iowa Code section 96.3(7). If an overpayment results from the reversal of an award of benefits based on an individual's separation from employment, it may be waived under certain circumstances. Benefits will not be recovered from an individual if the employer did not participate in the fact-finding interview on which the award of benefits was based, provided there was no fraud or willful misrepresentation on the part of the individual. This matter shall be remanded to Claims to determine if Mr. Bauman will be required to repay benefits already received.

DECISION:

The representative's decision dated November 14, 2008, reference 01, is hereby reversed. Mr. Bauman was discharged for misconduct in connection with his employment. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten

times his weekly job insurance benefit amount, provided he satisfies all other conditions of eligibility. This matter is remanded to Claims to determine the amount of any overpayment and whether Mr. Bauman will be required to repay benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/pjs