

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TRAVIS P KELLY
Claimant

APPEAL NO. 12A-UI-03034-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CRST VAN EXPEDITED INC
Employer

OC: 01/22/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated March 9, 2012, reference 01, that concluded he was discharged for work-connected misconduct. A telephone hearing was held on April 10, 2012. The parties were properly notified about the hearing. The claimant participated in the hearing. Sandy Matt participated in the hearing on behalf of the employer. Exhibits A-1 and One were admitted into evidence at the hearing.

ISSUES:

Did the claimant file a timely appeal?
Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked full time for the employer as a truck driver from February 25, 2011, to January 20, 2012. The claimant was informed and understood that under the employer's work rules, he could be discharged for moving violations in a company or personal vehicle, and a serious moving violation as defined by the Federal Motor Carrier Safety Regulation could result in immediate termination.

The claimant received a speeding ticket in Illinois on June 6, 2011, for driving 15 miles-per-hour over the limit. He notified the safety department about the ticket. The claimant's attorney was able to get the charge reduced based the speed limit being erroneously reported as 45 instead of 55 miles per hour at the location in question. He was told that this would be enough to protect his job, so he pled guilty to driving eight miles over the speed limit.

The claimant received a speeding ticket in Kern County, California, on October 14 for driving 60 in a 55-miles-per-hour zone. He received a speeding ticket in Needles, California, on November 5 for driving 64 in a 55-miles-per-hour zone. The claimant notified the safety department about the tickets and was advanced \$400.00 to contest the tickets. The speeding ticket issued in Needles ended up being dismissed in March 2012 when the police office did not

show for the trial. The claimant pleaded not guilty to the ticket issued in Kern County and is contesting the ticket because he was not speeding when he was cited.

The safety department received actual copies of the tickets on January 17, 2012. The employer discharged the claimant based on his receiving tickets in June, October, and November 2011.

An unemployment insurance decision was sent to the claimant's last-known mailing address on March 9, 2012. The decision concluded the claimant was discharged for work-connected misconduct and stated the decision would become final unless appealed by March 19, 2012.

The claimant lives with his aunt. He was away from home out of state when the decision was mailed. He returned home on March 17, 2012, and found the decision in a wall unit in his room. He tried faxing the appeal to the Appeals Bureau three times on March 19, but could not get the appeal to successfully transmit so he filed his appeal by certified mail on March 20.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the claimant filed a timely appeal.

The law states that an unemployment insurance decision is final unless a party appeals the decision within ten days after the decision was mailed to the party's last known address. Iowa Code § 96.6-2.

The Iowa Supreme Court has ruled that appeals from unemployment insurance decisions must be filed within the time limit set by statute and the administrative law judge has no authority to review a decision if a timely appeal is not filed. Franklin v. IDJS, 277 N.W.2d 877, 881 (Iowa 1979); Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979). In this case, the claimant's appeal was filed after the deadline for appealing expired.

The failure to file a timely appeal was due an Agency error in that the claimant attempted to file his appeal by the allowed method of faxing but the fax could not be transmitted, which under 871 IAC 24.35(2) would excuse the delay in filing an appeal. He filed the appeal immediately by mail the next day. The appeal is deemed timely.

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment

compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

871 IAC 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's rules stated that he could be discharged for moving violations in a company or personal vehicle, and a serious moving violation as defined by the Federal Motor Carrier Safety Regulation could result in immediate termination. A serious traffic violation for speeding is defined as a conviction for speeding 15 miles per hour or more over the posted speed limit. A commercial driver with a second conviction for a serious traffic violation is disqualified from driving a commercial motor vehicle for 60 days. 49 CFR § 383.51(c).

The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. Although the claimant may not have submitted copies of the tickets to the safety department, I believe the claimant's testimony that he notified the safety department after he received each ticket.

The claimant's violation back in June 2011, which resulted in a conviction of driving eight miles per hour over the speed limit, is a past act to consider in deciding the seriousness of any current acts. A speeding ticket is not a violation (unless the claimant admits he violated the law), it is just a charge or allegation. At the point the claimant was discharged, he was contesting the tickets and had not been convicted. In fact, one of the tickets was later dismissed and will never appear on the claimant's driving record. The claimant disputes that he was speeding on October 14, 2011, and is contesting the ticket. The only evidence presented to the contrary is the ticket. No current act of work-connected misconduct has been proven in this case.

DECISION:

The unemployment insurance decision dated March 9, 2012, reference 01, is reversed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/pjs