IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DARYN B WAGLER
Claimant

HELMICK TRUCKING LLC
Employer

APPEAL NO. 06A-UI-10006-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/10/06 R: 04
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Daryn Wagler filed a timely appeal from the October 5, 2006, reference 01, decision that that denied benefits. After due notice was issued, a hearing was held on October 30, 2006. Mr. Wagler participated and provided additional testimony through Ben Shinn Trucking Dispatcher Greg Richardson. Helmick Trucking Director of Safety Cheri Lynch represented the employer.

ISSUE:

Whether Mr. Wagler was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Daryn Wagler was employed by Helmick Trucking as a full-time over-the-road truck driver from February 2006 until September 1, 2006, when owner Duane Helmick discharged him. Helmick Trucking leases trucks and drivers to Ben Shinn Trucking. Mr. Wagler's immediate supervisors were Duane Helmick and Ben Shinn Dispatcher Greg Richardson. On August 10, Ben Shinn Trucking Director of Safety Sandy Carlson sent a letter to Mr. Helmick advising that Mr. Wagler would no longer be allowed to operate a vehicle owned or leased by Ben Shinn Trucking. Helmick Trucking received this letter by August 11 or 12. Despite the August 10 letter, Benn Shinn Trucking Dispatcher Greg Richardson continued to dispatch Mr. Wagler to haul loads until the end of August and Mr. Wagler continued to provide services to Helmick Trucking and Ben Shinn Trucking until August 30. Mr. Richardson had no direct conversation with Mr. Wagler or Mr. Helmick regarding Ms. Carlson's August 10 letter to Helmick Trucking. Mr. Richardson considered Mr. Wagler a good and reliable worker.

Ms. Carlson's letter of August 10 was based on the fact that Mr. Wagler had been cited on July 31, 2006 for speeding 75 m.p.h. in a 55 m.p.h. zone and cited for not having his Commercial Driver's License in his possession. Mr. Wagler contested the charges and had not been convicted as of the time of discharge from the employment with Helmick Trucking. In the letter, Ms. Carlson asserted that Mr. Wagler was no longer eligible to driver for Ben Shinn based

on Ben Shinn company policy and based on federal regulations. In July 2006, Ms. Carlson had issued a warning to Mr. Wagler after she became aware that Mr. Wagler had been cited twice in June for having a radar detector in his truck. Mr. Wagler contested the charges and had not been convicted as of the date of discharge from employment with Helmick Trucking.

The employer did not present testimony from Mr. Helmick or from Ms. Carlson.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Wagler was discharged for misconduct in connection with the employment. It does not.

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).

It is important to note that 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).

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).

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).

The administrative law judge is confronted in this matter with a claimant lacking in credibility and an employer who failed to present sufficient evidence to prove its case. The evidence indicates that Mr. Wagler was charged twice in June with having radar detectors in his truck in violation of federal regulations regarding commercial motor vehicles. Mr. Wagler testified at the hearing that he had such devices in his truck. While the administrative law judge concludes possession of the devices twice amounted to willful and/or wanton disregard for the interests of the employer, these incidents were not the final incident that prompted the discharge and no longer constituted "current acts" at the time of the discharge. The evidence indicates that Helmick Trucking discharged Mr. Wagler after learning that he had been charged with speeding and failure to have a C.D.L. in his possession. Speeding in a semi may well constitute misconduct, but the evidence indicates only an allegation, not proof that such conduct occurred. The charge regarding the C.D.L. not being in Mr. Wagler's possession was a less serious matter, but the evidence again indicates only an allegation, not proof that such conduct occurred. The employer clearly had the ability to present testimony from Mr. Helmick and/or Ms. Carlson, but elected to present testimony from neither. Uncorroborated allegations do not support a finding of misconduct. See 871 IAC 24.32(4). The fact that Mr. Wagler continued to work for Shinn Trucking and Helmick Trucking for 20 days after Ms. Carlson's letter to Mr. Helmick, and 29 days after the July 31 charges, presents another problem for the employer in that the employer had not provided a reasonable basis for the delay in discharging Mr. Wagler. Absent a reasonable basis for the delay, the conduct of July 31 would not constitute a current act that might serve as a basis for discharging Mr. Wagler from the employment with Helmick. See 871 IAC 24.32(8).

Though the decision to discharge Mr. Wagler was within the discretion of the employer, the administrative law judge concludes, based on the evidence in the record and application of the appropriate law, that Mr. Wagler was discharged for no disqualifying reason. Accordingly, Mr. Wagler is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Wagler.

DECISION:

The Agency representative's October 5, 2006, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw