IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

THOMAS FOLMAR Claimant **DECKER TRUCK LINE INC** Employer	**APPEAL 21A-UI-08731-AR-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/28/21** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

On March 29, 2021, claimant, Thomas Folmar, filed an appeal from the March 24, 2021, reference 01, unemployment insurance decision that denied benefits based upon the determination that the employer, Decker Truck Line Inc., discharged him for violation of a known company rule. The parties were properly notified about the hearing held by telephone on May 26, 2021. The claimant participated personally. The employer participated through Retention Manager and Safety Coordinator Jason Sorlien, with Director of Human Resources Courtney Bachel as an employer witness, though she did not testify. Employer's Exhibits 1 through 6 were admitted into the record. Also observing, but not participating, was Chief Administrative Law Judge Nicole Merrill.

ISSUE:

Did the employer discharge the claimant for job related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as an over-the-road truck driver beginning on March 16, 2012, and was separated from employment on February 25, 2021, when he was discharged for unsatisfactory operational safety performance.

On claimant's final day of work, February 23, 2021, he was parked at a stop when his rig became stuck. In attempting to free the rig, the driveshaft dropped, causing damage to the rig. Sorlien explained that, when rigs with automatic transmissions become stuck, drivers are not to attempt to rock the rig back and forth to become dislodged, as they would with manual transmission vehicles. Rather, the employer's policy was that drivers should call for assistance in the event the rig was stuck. Claimant rocked the rig back and forth in an attempt to dislodge, and did not call for assistance.

Claimant had a similar incident just over one year prior. In January 2020, his rig became stuck on ice, and the driveshaft dropped, causing damage. At that time, claimant was instructed about what to do when his rig was stuck. He was verbally counseled against rocking the rig.

After investigation, claimant's employment was terminated on February 25, 2021, by Sorlien. The employer testified that there were other incidents for which claimant received warnings and counseling, but they were not similar in nature to the final incident.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code § 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.

Iowa Admin. Code r. 871—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 Dep't of Job Serv.*, 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). 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).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

To the extent that the circumstances surrounding each accident were not similar enough to establish a pattern of misbehavior, the employer has only shown that claimant was negligent. "[M]ere negligence is not enough to constitute misconduct." *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 666 (Iowa 2000). A claimant will not be disqualified if the employer shows only "inadvertencies or ordinary negligence in isolated instances." Iowa Admin. Code r. 871—24.32(1)(a). When looking at an alleged pattern of negligence, previous incidents are considered when deciding whether a "degree of recurrence" indicates culpability. Claimant was careless, but the carelessness does not indicate "such degree of recurrence as to manifest equal culpability, wrongful intent or evil design" such that it could accurately be called misconduct. *Id.*; *Greenwell v. Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. Mar. 23, 2016). The employer has not established that claimant was so negligent in this situation that his conduct rose to the level of misconduct. While it demonstrated a history of previous incidents, only one was comparable. Furthermore, though he was apparently counseled against similar conduct in January 2020, he was not warned that further such conduct could result in the termination of his employment.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Though the employer testified that it, at times, warned claimant that his conduct could result in "progressive discipline up to and including termination," these warnings occurred after dissimilar incidents, and were remote in time as compared to the final incident. Claimant was not formally warned about the last incident in which the driveshaft dropped, and the employer has not demonstrated that he was aware that his employment could be terminated should a similar incident occur. The employer has not carried its burden.

DECISION:

The March 24, 2021, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Alexis D. Rowe
Administrative Law Judge

June 11, 2021
Decision Dated and Mailed

ar/kmj