IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JEFF G FRAHM Claimant	**APPEAL NO. 14A-UI-03951-JTT**
	ADMINISTRATIVE LAW JUDGE DECISION
HY-VEE INC Employer	
	OC: 03/16/14 **Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 8, 2014, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits. After due notice was issued, a hearing was held on May 2, 2014. Claimant Jeff Frahm did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Ajah Anderson of Corporate Cost Control represented the employer and presented testimony through Jeff Bortell. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant, which record indicates that no benefits have been disbursed to the claimant in connection with the claim that was effective March 16, 2014. Exhibits One through Five were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jeff Frahm was employed by Hy-Vee as an assistant manager until March 14, 2014, when Jeff Bortell, Store Director, discharged him from the employment for off-duty conduct that occurred on March 8, 2014. The conduct came to the employer's attention on March 14, 2014 when a 17 year old Hy-Vee employee and her mother, also a Hy-Vee employee, spoke to Mr. Bortell about a party that had occurred on March 8, 2014 at the apartment of another Hy-Vee employee. The 17 year old and her mother told Mr. Bortell that the 17 year old had consumed a small amount of alcohol at the part and had engaged in sexual activity with Mr. Frahm, a 21-year-old man. The 17 year old and/or her mother alleged that the 17 year old felt pressured to consume the alcohol and felt pressured to engage in sexual contact with Mr. Frahm. The 17 year old and/or her mother elected not to involve law enforcement in the matter.

The employer did not have a policy that extended to Mr. Frahm's purported off-duty conduct or that would have put him on notice that the purported off-duty conduct could result in discipline at work.

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.

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 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).

Violation of a specific work rule, even off-duty, can constitute misconduct sufficient to disqualify a claimant from unemployment insurance benefits. See Kleidosty v. Employment Appeal Board, 482 N.W.2d 416, 418 (Iowa 1992). But the employer must have a work rule that covers the off-duty conduct.

The evidence in the record establishes a discharge that was based on an *allegation* of off-duty misconduct. The employer had presented insufficient evidence to establish that Mr. Frahm indeed engaged in any form of misconduct on March 8, 2014. The employer did not present testimony from anyone with personal knowledge concerning the alleged off-duty conduct. The employer had the ability to present testimony through the 17 year old Hy-Vee employee and/or testimony from the Hy-Vee employee who hosted the party, but the employer elected not to present testimony from either. Even if the evidence had been sufficient to demonstrate off-duty misconduct, the employer has presented insufficient evidence to establish a work rule that would extend to the off-duty conduct. In other words, the evidence would not have demonstrated misconduct *in connection with the employment*.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Frahm was discharged for no disqualifying reason. Accordingly, Mr. Frahm is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The claims deputy's April 8, 2014, reference 01, decision is affirmed. 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

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