

**IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI**

**RICARDO (RICK) RODRIGUEZ  
3218 DAKOTA AVE  
SOUTH SIOUX CITY NE 68776**

**ORKIN INC  
c/o GATES MCDONALD & COMPANY  
NOW TALX UC EXPRESS  
PO BOX 182366  
COLUMBUS OH 43218-2366**

**ORKIN INC  
c/o TALX UC EXPRESS  
PO BOX 283  
ST LOUIS MO 63166-0283**

**Appeal Number: 05A-UI-05656-RT  
OC: 05/01/05 R: 01  
Claimant: Respondent (1)**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct  
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Orkin, Inc., filed a timely appeal from an unemployment insurance decision dated May 17, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Ricardo (Rick) Rodriguez. After due notice was issued, a telephone hearing was held on June 15, 2005, with the claimant participating. Sergio Hernandez, Branch Manager of the employer's location in Harlingen, Texas, participated in the hearing for the employer. Employer's Exhibits One and Two were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses, and having examined all of the evidence in the record, including Employer's Exhibits One and Two the administrative law judge finds: The claimant was employed by the employer, most recently, as a route manager in Harlingen, Texas, from March 1, 2002, until he was discharged on April 15, 2005. The claimant was hired and worked in Sioux City, Iowa, and then was transferred to Harlingen, Texas. The claimant was discharged on April 15, 2005, because a random background check performed by Choice Point revealed a criminal conviction of the claimant for disorderly conduct on May 13, 2003. The employer has a policy that prohibits fighting, as shown at Employer's Exhibit Two, and also prohibits hiring individuals with criminal convictions. When the claimant was charged with disorderly conduct, he was in Sioux City, Iowa, and he informed the branch manager in Sioux City, Iowa, Mike King. When the claimant pled guilty and was convicted, he again informed Mr. King of this. Mr. King reported this to the employer and told the claimant that the employer would send him papers. The employer did so. The claimant was informed that the employer would eventually make a decision on his employment. The employer continued to allow the claimant to work and eventually the claimant was transferred to Harlingen, Texas, where he continued to work until his conviction was "discovered" through a random background check. At that time, the claimant was discharged on April 15, 2005. There is no other reason for the claimant's discharge. Pursuant to his claim for unemployment insurance benefits filed effective May 1, 2005, the claimant has received unemployment insurance benefits in the amount of \$2,037.00 as follows: \$291.00 per week for seven weeks from benefit week ending May 7, 2005 to benefit week ending June 18, 2005.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. He is 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).

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 parties agree, and the administrative law judge concludes, that the claimant was discharged on April 15, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for a current act of disqualifying misconduct. It is well established that the employer has the burden to prove a current act of disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for a current act of disqualifying misconduct.

The testimony of the witnesses is remarkably similar. The only reason for the claimant's discharge was a criminal conviction for disorderly conduct on May 13, 2003. At that time, the claimant was already employed with the employer in Sioux City, Iowa. The claimant properly reported this conviction to the branch manager in Sioux City, Iowa, Mike King, both before his conviction and after his conviction. Mr. King informed the employer and the employer even sent the claimant papers about the conviction. The employer informed the claimant that the employer would eventually make a decision about his employment. However, the employer allowed the claimant to work for nearly two years after his conviction until the conviction was "discovered" by a random background check by Choice Point. At that point, the claimant was discharged. However, the claimant had informed the employer, even before his conviction, of the criminal proceedings. The administrative law judge must conclude on the evidence here that the employer's discharge of the claimant two years after his conviction, and two years after being informed of the claimant's conviction, is a discharge for a past act. A discharge for disqualifying misconduct cannot be based on a past act. It is true that a past act can be used to determine the magnitude of a current act of misconduct, but there is no evidence whatsoever of any current act of disqualifying misconduct. The employer cannot wait two years to discharge the claimant for an act that the claimant reported two years earlier and then expect to deny the claimant unemployment insurance benefits. The administrative law judge is not even convinced

that the claimant's criminal conviction for disorderly conduct on May 13, 2003, is an act of disqualifying misconduct, but the administrative law judge does not have to reach that issue. The administrative law judge concludes that the claimant's criminal conviction, if disqualifying misconduct, was a past act of disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged, but not for a current act of disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$2,037.00 since separating from the employer herein on or about April 15, 2005, and filing for such benefits effective May 1, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

#### DECISION:

The representative's decision of May 17, 2005, reference 01, is affirmed. The claimant, Ricardo (Rick) Rodriguez, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged, but not for a current act of disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out his separation from the employer herein.

kjw/kjw