

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MARK E MAIN**  
Claimant

**APPEAL NO. 07A-UI-05401-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FMC/MARC INC**  
**ARBIES**  
Employer

**OC: 05/06/07 R: 02**  
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

FMC/Marc, doing business as Arbies, filed a timely appeal from the May 22, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 27, 2007. Claimant Mark Main participated. Alyce Smolsky of Johnson & Associates/TALX UC eXpress represented the employer and presented testimony through Deb Raymer, District Manager, and Cheryl Sullivan, Director of Human Resources. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received employer's exhibits One through 13 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: The claimant was employed by Arbies on a full-time basis from November 17, 2004 until May 16, 2007, when District Manager Deb Raymer discharged him. The claimant had started the employment as a crew member. The claimant's immediate supervisor throughout the employment was Store Manager Jennifer Hall. The employer discharged Ms. Hall from her employment on June 19, 2007. At the time the claimant commenced the employment, he went by the name Mark Eugene *Hampe*. The claimant used this name when completing income tax withholding documents and other documents relating to the employment. These documents were placed in the claimant's personnel file. In January 2005, the employer had the claimant execute a release of information document that would authorize the employer to run a criminal history check. The employer then conducted a criminal history check and learned that in 2003 Mark Eugene Hampe had entered a guilty plea to Theft in the Third Degree, an aggravated misdemeanor, and had received a deferred judgment. The employer took no further action on this information.

On August 11, 2006, the claimant married. The claimant adopted his wife's last name, *Main*. On August 17, 2006, the claimant used this name Mark Eugene *Main* to complete income tax withholding documents and other documents relating to the employment. These documents were placed in the claimant's personnel file.

In October 2006, the claimant applied for a promotion to shift manager. On October 20, 2007, in connection with this application, the employer had the claimant execute a release that would authorize the employer to conduct a criminal history check. The release form contained a blank for listing an alias, maiden name, and/or nickname. The claimant used the name Mark Main, but made no reference to having previously used the last name *Hampe*. The release contained small font text that provided as follows:

I understand and agree that any information provided by me that is found to be false, incomplete or misrepresented in any respect in the Company's sole judgment, will be cause to cancel further consideration of my application for employment and/or contracting services whenever such discrepancies are discovered. Further, I understand that by requesting this information that no promise of employment is being made.

Below this text, and above the blank for "Other Names," was the following certification:

I HEREBY CERTIFY THAT THIS FORM WAS COMPLETED BY ME, AND THAT THE INFORMATION PROVIDED IS TRUE AND CORRECT AS OF THE DATE HEREOF.

The claimant signed the certification and dated the document October 20, 2006. The claimant provided a social security number, the last four digits of which were 7092, though the 9 was rather sloppy. On October 27, 2006, the employer ran a criminal history check on Mark E. Main and the criminal history check revealed no criminal conduct or convictions. The employer or its agent had mistaken the sloppy 9 in the claimant's social security number for a 5 and had erroneously used a social security number ending in 7052 in connection with the criminal history check.

On April 6, 2007, local law enforcement officers commenced a criminal investigation into unauthorized use of an Arbies customer's credit card on March 30, 2007. The unauthorized use resulted in a \$20.00 charge to the customer's account. The claimant was determined to be among one of the two or three people working at the time of the incident who had access to the pass code necessary to process a credit card charge at the restaurant. On May 1 or 2, a police officer told Mr. Main that law enforcement suspected he was the person who made the unauthorized charge to the customer's credit card on March 30, 2007. The police officer requested that the claimant submit to a polygraph. The claimant agreed to the polygraph and the polygraph test took place on May 7, 2007. Mr. Main failed the polygraph test. After the failed test, Mr. Main admitted to the unauthorized use of the credit card and provided a written statement admitting to the conduct. Mr. Main was charged with a crime and was given a court date of May 16, 2007. The exact status of the pending criminal matter is still unclear as of the time of the appeal hearing. Mr. Main has another court date in July. On May 7, Mr. Main contacted Store Manager Jennifer Hall with the outcome of the polygraph test. At some point on or before May 7, 2007, Mr. Main told Ms. Hall that his deferred judgment from 2003 concerned theft from a prior employer.

On May 8, Mr. Main contacted Ms. Hall to inquire whether he still had a job. Ms. Hall advised Mr. Main that he did not. Mr. Main then established a claim for unemployment insurance benefits that was effective May 6, 2007 and received benefits.

On May 16, District Manager Deb Raymer contacted Mr. Main by telephone and advised him that he had been discharged for providing falsifying information for the October 20, 2006 authorization for a criminal history check because he had not listed Mark Eugene *Hampe* as an alias. The employer also alleged that Mr. Main had deliberately provided an incorrect social security number. The employer's Rules of Conduct prohibit "Falsifying information, i.e. applications, inventory counts, false information, etc." Mr. Main initialed and signed his acknowledgment of the work rules on November 17, 2004.

## **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.

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.

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).

In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved. 871 IAC 24.32(4).

The greater weight of the evidence in the record establishes that the employer severed the employment relationship on May 8, 2007, when Ms. Hall informed Mr. Main that he no longer had employment. The greater weight of the evidence indicates that the discharge was prompted by the investigation into unauthorized use of a customer's credit card on March 30, 2007, which investigation commenced on April 6, 2007. The greater weight of the evidence indicates that the unauthorized use of the card came to employer's attention in early April and that Mr. Main was identified as a suspect in April. The evidence indicates that the employer took no steps to notify the claimant that the conduct subjected the claimant to possible discharge until Ms. Hall discharged Mr. Main on May 7, 2007. Because of this delay, the evidence in the record fails to establish a "current act" of misconduct in so far as the unauthorized use of the credit card is concerned. See 871 IAC 24.32(8).

The greater weight of the evidence in the record does not support the employer's assertion that Mr. Main was discharged for providing false information on the October 20, 2007 release. The evidence indicates that the employer was aware in August that the claimant had begun going by the last name Main. The employer was aware from the start of the employment that the claimant went by the last name Hampe. The greater weight of the evidence fails to establish that the claimant misrepresented his social security number on the October 20 release. The evidence indicates instead that the claimant's handwriting on the October 20 release was sloppy and the employer, or its agent, misinterpreted the claimant's "9" as a "5." The greater weight of the evidence fails to indicate that Mr. Main intentionally omitted the alias from the October 20 release. Regardless of the intentionality of the omission, the evidence indicates an omission on October 20 that would have been readily apparent to the employer on that date if it glanced at Mr. Main's personnel file. The evidence indicates that the employer took no steps to notify the claimant that the conduct subjected the claimant to possible discharge until Ms. Sullivan commenced her investigation on May 7. The evidence in the record fails to establish a "current act" of misconduct in so far as the October 20 release is concerned. See 871 IAC 24.32(8).

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

**DECISION:**

The Agency representative's May 22, 2007, 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

jet/pjs