

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MAN C DIEP
Claimant

APPEAL NO. 06A-UI-09701-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AG PROCESSING INC A COOPERATIVE
Employer

**OC: 09/03/06 R: 01
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Man Diep filed a timely appeal from the September 27, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 17, 2006. Mr. Diep participated. Attorney Lynn Corbeil represented the employer and presented testimony through John Rever, Plant Superintendent at Sergeant Bluff. Employer's Exhibits One, Two and Three were received into evidence.

ISSUES:

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

Whether the claimant's failure to disclose a prior felony sex abuse conviction in his application or interview constituted misconduct. It did.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Man Diep was employed by Ag Processing as a full-time utility worker from July 31, 2006 until August 30, 2006, when Jim Seiler, Vice President of Human Resources, decided to discharge him from the employment. Plant Superintendent John Rever and Plant Manager Carl Parker executed the discharge.

The employer discharged Mr. Diep for failing to disclose a prior felony sex abuse conviction on his application and during the interview. Mr. Diep completed a written application to secure the employment. One question on the application asked whether the applicant had been convicted of a crime. Boxes were provided next to the question so that the applicant could indicate a "yes" or a "no" response to the question. Beneath the question was a request for an explanation concerning an affirmative response and a notice that an affirmative response would not necessarily bar the applicant from being hired. Mr. Diep left both the "yes" and "no" box blank. In the space provided for explanation, Mr. Diep wrote, "Please!!! Explain when I have an interview please!!!" Before Mr. Diep signed the application for employment, he read the "Applicant's Statement" above the space provided for his signature. That information provided that, "I understand that the furnishing of any misleading, false or incorrect information on this Form or its attachments will be just cause for termination should I become employed by AGP

regardless of when or how discovered.” The information further provided that, “I certify the information provided by me on this Application Form and its attachments is true and correct.” Mr. Diep had decided that he would only disclose the prior conviction if the employer questioned him about prior convictions at the time of the interview.

In July, Mr. Rever and Project Coordinator Loren Frances interviewed Mr. Diep. Based on Mr. Diep's response on the application to the question concerning prior convictions, Mr. Rever asked Mr. Diep whether he had prior convictions. Mr. Diep indicated at that time that he had only been accused of theft at a prior employment. Mr. Diep provided no other information regarding prior convictions. The employer had received a positive reference for Mr. Diep and, based on that reference, hired Mr. Diep.

On August 29, the employer received the results of a criminal history check concerning Mr. Diep. Those materials indicated that Mr. Diep had a prior felony conviction for Sexual Abuse in the Third Degree. On August 30, Mr. Rever and Mr. Parker questioned Mr. Diep about the prior conviction and Mr. Diep admitted to the prior conviction and to having served a prison sentence in connection with the conviction. Mr. Rever and Mr. Parker communicated this information to the Vice President of Human Resources. The employer discharged Mr. Diep for providing false or misleading information on the application and at the interview.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Diep was discharged for misconduct in connection with the employment. It does.

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).

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).

The weight of the evidence indicates that Mr. Diep intentionally omitted information regarding his prior conviction for felony sex abuse when completing the application for employment. Mr. Diep indicated on the application that he would provide further explanation at the interview. The employer specifically asked Mr. Diep about his response on the application and whether he had any prior convictions. Mr. Diep intentionally withheld information regarding the felony sex abuse conviction and led the employer to believe he had no prior convictions. The employer had the right to know about the prior conviction to protect its employees and to determine whether it was exposing itself to liability if it hired Mr. Diep. Mr. Diep's deception did not come to the attention of the employer until August 29 and the employer discharged him the next day. Accordingly, the misconduct constituted a "current act." 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. Diep was discharged for misconduct. Accordingly, Mr. Diep is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Diep.

DECISION:

The Agency representative's September 27, 2006, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment

benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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