

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

JASON R ROCKWELL
2320 – 31ST ST A
MOLINE IL 61265-4307

APAC CUSTOMER SERVICES OF IOWA
LLC
c/o TALX UCM SERVICES INC
PO BOX 283
ST LOUIS MO 63166

Appeal Number: 06A-UI-07646-JTT
OC: 06/11/06 R: 04
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party request the Appeals Section to reopen the record at the address listed at the top of this decision or 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, 4th 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

APAC Customer Services of Iowa appealed from an unemployment insurance decision dated July 18, 2006, reference 01, that allowed benefits. A telephone hearing was scheduled for August 15, 2006. Benefits administrator Turkessa Hill represented the employer. The claimant did not respond to the hearing notice instructions and did not participate. The administrative law judge took official notice of the Agency's administrative record regarding benefits disbursed to the claimant.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jason Rockwell was employer by APAC Customer Services of Iowa as a full-time team leader from

December 19, 2005 until June 10, 2006, when Operations Manager Paul Flemmer suspended him. On June 10, Mr. Rockwell contacted Mr. Flemmer to request a leave of absence to deal with a personal matter. Upon further discussion, Mr. Rockwell disclosed that he had been charged with credit card fraud. Upon hearing this information, Mr. Flemmer advised Mr. Rockwell that he would not be allowed to return to the employment so long as the criminal prosecution was pending. The employer is in the business of marketing products, including credit cards, for client businesses. As a provision of the employer's contractual agreements, the employer is prohibited from employing employees with a history of theft, fraud, or felony conviction to market credit cards. The employer does not believe Mr. Rockwell would have been made aware of this condition prior to the discussions surrounding his suspension and discharge. The employer utilizes a pre-employment screening process and had asked Mr. Rockwell, in the employment application, whether he had been convicted or pleaded guilty to a criminal offense. Mr. Rockwell indicated he had not and the employer believes this was a truthful statement at the time of hire. On August 7, Mr. Rockwell contacted the employer and spoke with Mr. Flemmer and Human Resources Director Katherine Hughes to indicate the criminal proceedings had ended and to discuss his return to the employment. Mr. Rockwell advised that he had been convicted of the credit card fraud charge. Mr. Flemmer and Ms. Hughes advised Mr. Rockwell that, based on the conviction, he would be discharged from the employment. There had been no other reason for the suspension or final discharge. The criminal charge concerned off-duty conduct and did not involve property of the employer, its employees, or its clients.

REASONING AND CONCLUSIONS OF LAW:

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

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).

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. In Kleidosty v. EAB, 482 N.W.2d 416, 418 (Iowa 1992). In Kleidosty, the employer had a specific rule prohibiting immoral and illegal conduct. The worker was convicted of selling cocaine off the employer's premises. The Supreme Court of Iowa found misconduct. In its analysis, the Court stressed the importance of a specific policy, even one which was stated only in terms of illegal or immoral conduct.

The present case differs from the facts in Kleidosty. The evidence indicates the employer did not have a specific work rule that governed the off-duty conduct. Though the decision to discharge Mr. Rockwell was within the discretion of the employer, the evidence in the record failed to establish misconduct *in connection with the employment*. Accordingly, Mr. Rockwell was discharged for no disqualifying reason and is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Rockwell.

DECISION:

The Agency representative's July 18, 2006, 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.

jt/pjs

