

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KEITH E WAGNER**  
Claimant

**APPEAL NO. 13A-UI-09834-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**VANGENT INC**  
Employer

**OC: 08/04/13**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Keith Wagner filed a timely appeal from the August 26, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 30, 2013. Mr. Wagner participated. Rethy Krishnamurthy represented the employer and presented additional testimony through Stacey Harney.

**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 employer contracts with the United States government to provide customer service in connection with the Medicare program. The employer's handling of patient information is governed by multiple federal privacy laws including HIPAA. Keith Wagner was employed by Vangent, Inc., as a full-time lead quality specialist from 2004 until August 6, 2013, when he was discharged for violating the employer's Control of Operational Areas policy. Mr. Wagner worked in a call center environment. The written Control of Operational Areas policy prohibited personal electronic devices capable of capturing or transmitting information, including cell phones, in the work area. The purpose of the policy was to prevent unauthorized sharing of patients' health information. Mr. Wagner was aware of the policy and had received a copy of the policy. The employer regularly reviewed the policy with employees.

On July 25, 2013, Mr. Wagner had his smart phone at his work station. It was Mr. Wagner's 67th birthday and he was waiting to hear from his son whether his son would be able to join him for lunch. Mr. Wagner had secured his phone in a locked desk, but took it out to look at the outside of the smart phone for a symbol or icon indicating that his son had called or emailed. Mr. Wagner did not access his phone beyond that. An employee observed Mr. Wagner in possession of his phone and reported the conduct to supervisor Stacy Harney, who spoke to Mr. Wagner. Mr. Wagner confirmed possession of his phone and confirmed that he had been checking for an email message from his son. Ms. Harney reminded Mr. Wagner of the Control

of Operational Areas policy and told him that his conduct could leave to discipline up to termination of the employment. The employer discharged Mr. Wagner on August 6, 2013.

The employer had earlier reviewed the written policy with Mr. Wagner on June 4, 2013, when Mr. Wagner had left paperwork unsecured at his desk while he was absent from his desk. The paperwork in question was general information regarding the employer's 401K retirement program. The employer's policy required that all paperwork be secured when Mr. Wagner was away from his desk.

## **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) alone. 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).

The evidence in the record establishes that Mr. Wagner violated the employer's Control of Operational Areas policy when he possessed and accessed his personal cell phone in an area where possession and use of the cell phone was prohibited. Mr. Wagner asserts that the policy was ambiguous, but there was nothing ambiguous about the policy. The cell phone prohibition originated with the employer's client, the United States government, which mandated strict workplace protocols in order to safeguard confidential medical information. The weight of the evidence indicates that Mr. Wagner in fact understood the policy, the rationale behind the policy, and that the employer had recently reviewed the policy with him. Under the particular circumstances, Ms. Wagner's possession and access of his cell phone in the restricted area did indeed rise to the level of misconduct in connection with the employment. Mr. Wagner 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.

**DECISION:**

The agency representative's August 26, 2013, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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