

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KRISTEN M DOERR
Claimant

APPEAL NO. 10A-UI-05362-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOWA-NEBRASKA STATE BANK
Employer

OC: 03/07/10
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 26.8(5) – Decision on the Record

STATEMENT OF THE CASE:

Kristen Doerr appealed from an unemployment insurance decision dated April 2, 2010, reference 01, that denied benefits based on an Agency conclusion that she had been discharged for misconduct in connection with the employment. A telephone hearing was scheduled for May 20, 2010. Neither Ms. Doerr nor the employer responded to the hearing notice instructions to provide a telephone number for the hearing and neither participated in the hearing. Based on the parties' failure to participate in the hearing, the administrative file, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law and decision.

ISSUES:

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

Whether the discharge was based on a current act.

FINDINGS OF FACT:

The parties were properly notified of the scheduled hearing on this appeal by notice mailed on April 22, 2010. Neither party provided a telephone number at which the party could be reached for the hearing. Neither party participated in the hearing. Neither party requested postponement of the hearing as required by the hearing notice. There is no evidence that the hearing notice mailed to either party was returned by the Postal Service as undeliverable for any reason.

The administrative law judge has conducted a careful review of the administrative file to determine whether the unemployment insurance decision should be affirmed. No documents supporting the April 2, 2010, reference 01, decision had been scanned into the Workforce Development computer system. Thus, there is no administrative file documentation available for the administrative law judge to review aside from the April 2, 2010, reference 01, decision itself and the claimant's appeal letter.

Ms. Doerr worked for Iowa-Nebraska State Bank from 2006 until March 11, 2010, when the employer discharged her for making unauthorized inquiries into customers' accounts. Ms. Doerr did not release any information concerning the customers' accounts and knew that such a release of information would result in termination of her employment. It is not clear when Ms. Doerr's unauthorized inquiries came to the attention of the employer or when the employer first notified Ms. Doerr that the conduct placed her employment in jeopardy.

REASONING AND CONCLUSIONS OF LAW:

871 IAC 26.8(3), (4) and (5) provide:

Withdrawals and postponements.

(3) If, due to emergency or other good cause, a party, having received due notice, is unable to attend a hearing or request postponement within the prescribed time, the presiding officer may, if no decision has been issued, reopen the record and, with notice to all parties, schedule another hearing. If a decision has been issued, the decision may be vacated upon the presiding officer's own motion or at the request of a party within 15 days after the mailing date of the decision and in the absence of an appeal to the employment appeal board of the department of inspections and appeals. If a decision is vacated, notice shall be given to all parties of a new hearing to be held and decided by another presiding officer. Once a decision has become final as provided by statute, the presiding officer has no jurisdiction to reopen the record or vacate the decision.

(4) A request to reopen a record or vacate a decision may be heard ex parte by the presiding officer. The granting or denial of such a request may be used as a grounds for appeal to the employment appeal board of the department of inspections and appeals upon the issuance of the presiding officer's final decision in the case.

(5) If good cause for postponement or reopening has not been shown, the presiding officer shall make a decision based upon whatever evidence is properly in the record.

The administrative law judge has carefully reviewed the limited available administrative file record and concludes that he cannot affirm the unemployment insurance decision previously entered in this case.

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 a discharge 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).

The employer has failed to appear for the hearing and has thereby failed to present any evidence whatsoever to support the allegation that Ms. Doerr was discharged for misconduct in connection with the employment that would disqualify her for unemployment insurance benefits. The available administrative file evidence fails to establish *when* the conduct came to the attention of the employer and thereby fails to establish a "current act." See 871 IAC 24.32(8). In the absence of a current act, the discharge would not disqualify Ms. Doerr for unemployment insurance benefits. See 871 IAC 24.32(8). In the absence of a current act, the administrative law judge need not rule on whether the conduct in question constituted misconduct. Ms. Doerr is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

Pursuant to Iowa Administrative Code rule 871 IAC 26.8(3), (4) and (5), a party desiring to reopen the record must make a written request to the administrative law judge that the hearing be reopened within 15 days after the mailing date of this decision. The written request should be mailed to the administrative law judge at the address listed at the beginning of this decision and must explain the emergency or other good cause that prevented the appellant from participating in the hearing at its scheduled time.

DECISION:

The Agency representative's April 2, 2010, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

This decision will become final unless a written request establishing good cause to reopen the record is made to the administrative law judge within 15 days of the date of this decision.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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