

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

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US BANK NATIONAL ASSOCIATION
C/o JON-JAY ASSOCIATES NIC
PO BOX 182523
COLUMBUS OH 43218-2523

Appeal Number: 06A-UI-05443-JTT
OC: 04/30/06 R: 01
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party 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:

US Bank National Association filed a timely appeal from the May 16, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 28, 2006. Claimant Susan Anesi participated. Branch Manager Jackie Lagge represented the employer. Exhibits One through Five were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Susan Anesi was employed by US Bank National Association as a full-time teller from January 12, 2004 until May 1, 2006, when Branch Manager Jackie Lagge discharged her.

The final incident that prompted the discharge occurred on April 5, 2006, when Ms. Anesi's teller drawer was short \$400.00. The shortage was discovered at the end of the day. Ms. Anesi and back up manager Sue Benkis were the only employees working at the branch and were preparing to close the office. Ms. Anesi had balanced her teller drawer and the drawer had balanced out with the appropriate amount of funds. Ms. Benkis then instructed Ms. Anesi to go secure the restroom doors open in preparation for closing the office and told Ms. Anesi that she would watch her drawer until she returned. Ms. Anesi handled one more transaction and then did the final balancing of her drawer for the day. At that time, Ms. Anesi discovered her drawer was short by four \$100.00 bills. On April 6, Assistant Manager Stacy Nelson notified Branch Manager Jackie Lagge of the \$400.00 shortage. Pursuant to the employer's policy regarding teller drawer shortages, Ms. Anesi was given 15 business days in which to locate the missing \$400.00. The matter was referred to the bank's internal investigator. The internal investigator did not testify at the hearing and Branch Manager Jackie Lagge was not able to testify to the steps the investigator took or whether surveillance video was reviewed. When the missing money was not located within 15 business days, Ms. Lagge discharged Ms. Anesi. Ms. Anesi had experienced prior variances in her teller drawer, most notably one in January for \$400.00. That money was also not found.

Soon after Ms. Anesi's discharge, the bank discovered that back up manager Sue Benkis had stolen several hundred dollars from a customer's account and discharged Ms. Benkis for theft.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Anesi 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). 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).

A preponderance of the evidence indicates that Ms. Anesi followed her immediate supervisor's instructions on April 5 and briefly stepped away from her unsecured teller drawer. Ms. Anesi had just balanced her drawer. Ms. Anesi balanced her drawer again within a few minutes of being instructed to step away and then noted a \$400.00 shortage. The person who told Ms. Anesi to step away was shortly thereafter discovered to have committed theft of bank and/or customer funds. A preponderance of the evidence indicates that Ms. Benkis most likely took the \$400.00 missing from Ms. Anesi's drawer. In any event, the evidence does not indicate that Ms. Anesi engaged in any intentional misconduct or that she was careless or negligent in connection with the shortage on April 5. The evidence in the record fails to establish a "current act" that might serve as a basis for disqualifying Ms. Anesi for unemployment insurance benefits.

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

DECISION:

The Agency representative's decision dated May 16, 2006, reference 01, is affirmed. 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.

jt/kkf