

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

DONALD L NICOLAISEN
648 OSAGE
CHARITON IA 50049

HY-VEE INC
c/o TALX UCM SERVICES INC
PO BOX 283
ST LOUIS MO 63166-0283

TALX UC EXPRESS
3799 VILLAGE RUN DR #511
DES MOINES IA 50317

Appeal Number: 06A-UI-00478-JTT
OC: 12/11/05 R: 03
Claimant: Appellant (2)

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:

Claimant Donald Nicolaisen filed a timely appeal from the January 6, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on January 31, 2006. Mr. Nicolaisen participated. David Williams of TALX UC eXpress represented the employer and presented testimony through Department Manager Dan Dresser and Assistant Department Manager Ed Hull.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Donald Nicolaisen was employed by Hy-Vee as a part-time order selector in the cheese and dairy department at the employer's distribution facility from April 19, 2005 until December 15, 2005, when Department Manager Dan Dresser discharged him.

The final incident that prompted the discharge came to employer's attention on December 15, 2005, when employee Bill Wetterling advised Mr. Dresser that Mr. Wetterling's daughter, Kassie Wetterling, was afraid to return to work because of Mr. Nicolaisen. The daughter was a part-time employee at the facility. Mr. Wetterling alleged that Mr. Nicolaisen had made a sexually harassing remark directed at Ms. Wetterling. Mr. Dresser next spoke to Ms. Wetterling. Ms. Wetterling advised that another employee, Andy Crawford, had advised her that Mr. Nicolaisen had told Mr. Crawford that Ms. Wetterling "needed to get fucked."

The employer did not present testimony from Bill Wetterling, Kassie Wetterling, or Andy Crawford. All three individuals are currently Hy-Vee employees. The employer advises that Mr. Crawford is currently incarcerated and that the employer notified TALX of this fact two weeks prior to the hearing.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Nicolaisen 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).

Since the claimant was discharged, 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 to 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 evidence in the record is insufficient to support a conclusion that Mr. Nicolaisen was discharged for misconduct in connection with the employment. The employer has failed to provide sufficiently direct and satisfactory evidence to support the allegation of misconduct. The employer had the ability to produce testimony from Mr. Wetterling, Ms. Wetterling, and/or Mr. Crawford and failed to do so. The fact that Mr. Crawford is incarcerated does not make him unavailable to the employer as a witness. The employer made no request for a subpoena to compel testimony from any witness.

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

DECISION:

The Agency representative's decision dated January 6, 2006, reference 01, is reversed. 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/kjw