

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TONY C MENNE**  
Claimant

**APPEAL NO. 14A-UI-00152-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**JEFF AND STEVE KRAMER TRUCKING**  
Employer

**OC: 12/08/13**  
**Claimant: Respondent (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct  
Iowa Code Section 96.3(7) – Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the December 26, 2013, reference 01, decision that allowed benefits to the claimant provided the claimant was otherwise eligible and that held the employer's account could be charged for benefits. After due notice was issued, a hearing was held on February 18, 2014. Claimant Tony Menne participated. Jeff Kramer represented the employer and presented additional testimony through Steve Kramer, Rob Harms, and Carissa Kramer. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant and received Exhibits One through Six into evidence.

After the hearing record closed, the Appeals Section received an additional six pages of proposed exhibit materials from the employer. Those materials were received too late to be considered, were not provided to the claimant prior to the appeal hearing, and were not received into the record.

**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: Tony Menne was employed by Jeff and Steve Kramer Trucking as a full-time general farm laborer and truck driver from 2011 until December 6, 2013, when Jeff and Steve Kramer discharged him for unauthorized personal use of a company issued credit card. Early in the employment, the employer provided Mr. Menne with a Discover Card credit card for business-related use such as when Mr. Menne needed to put fuel in the employer's truck. The card had the employer's name on it and did not have Mr. Menne's name on it. On December 6, 2013, the employer contacted the credit card company and learned that Mr. Menne had made unauthorized use of the credit card on four occasions between November 28, 2013 and December 1, 2013. The total charged to the credit card by Mr. Menne during that period was \$198.26. Mr. Menne had used the card at a pizza restaurant, at a Casey's and at two Hy-Vee stores. This unauthorized use of the

employer's credit card followed earlier similar issues. On an earlier occasion, Mr. Menne had made unauthorized use of the credit card to obtain fuel for a personal vehicle and had later reported his use of the credit card to Carrissa Kramer, bookkeeper. At that time, Ms. Kramer stressed the importance of paying the company back. Ms. Kramer was not Mr. Menne's supervisor and did not give Mr. Menne permission to use the credit card for personal use. The employer had earlier reminded Mr. Menne that the card was strictly for business use only.

Mr. Menne established a claim for benefits that was effective December 8, 2013 and, so far, has received \$3,950.00 in benefits for the period of December 8, 2013 through February 15, 2014.

The employer personally participated in the fact-finding interview that led to the December 26, 2013, reference 01, decision that allowed benefits to the claimant.

### **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). 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 weight of the evidence in the record establishes that the employer had issued Mr. Menne a credit card to be used strictly for purposes related to the employer's business. The employer had previously warned Mr. Menne that the card was for business use only. The employer had not given Mr. Menne permission to use the credit card for non-work related purposes. The final incident that triggered the discharge involved repeated unauthorized use of the employer's credit card during the period of November 28 through December 1, 2013. Mr. Menne's unauthorized use of the employer's credit card demonstrated a willful and wanton disregard of the employer's interests and constituted misconduct in connection with the employment. Mr. Menne 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 unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid \$3,950.00 in benefits for the period of December 8, 2013 through February 15, 2014. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits already paid to the claimant or for future benefits.

**DECISION:**

The Agency representative's December 26, 2013, reference 01, decision is reversed. 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 shall not be charged for benefits. The claimant is overpaid \$3,950.00 in benefits for the period of December 8, 2013 through February 15, 2014. The claimant must repay that amount. The employer's account will not be charged for the overpaid benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs