

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TERRY L ROUTT**  
Claimant

**APPEAL NO. 09A-UI-14781-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HARRISON TRUCK CENTERS INC**  
**HARRISON TRUCK CENTERS**  
Employer

**Original Claim: 08/16/09**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Terry Routt filed a timely appeal from the September 22, 2009, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on October 30, 2009. Mr. Routt participated. Mike Wester, General Manager, represented the employer and presented additional testimony through Brian Harrison, President, and Adam Hesse, Assistant Parts Manager.

**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 operates a Freightliner full service dealership in Waterloo. Terry Routt was employed by Harrison Truck Centers as a full-time outside parts salesman from October 21, 2008 until August 19, 2009, when Mike Wester, General Manager, and Brian Harrison, President, discharged him. Mr. Routt used a company van that bore the employer's logo as he conducted his sales calls.

On August 18, 2009, an alleged off-duty police officer contacted Mr. Harrison and alleged he had witnessed Mr. Routt use the employer's van to pick up a prostitute in an area of downtown Waterloo the employer alleges is known for prostitution. Mr. Harrison is a reserve police officer and placed weight in what the alleged off-duty officer told him. Mr. Routt had no business calls that would take him to that area of Waterloo. At the time of the alleged incident, Mr. Routt was killing time while he waited for his mother to finish a medical appointment some four miles away from the area where the alleged off-duty officer alleged he saw Mr. Routt. The employer knows the identity of the alleged off-duty officer, but refuses to disclose the same to the administrative law judge.

On August 19, 2009, Mr. Wester confronted Mr. Routt about the alleged conduct. Mr. Routt admitted to being in downtown Waterloo, but denied picking anyone up. Mr. Routt admitted he had gone to a boat ramp area near a park, an area the employer alleges is known for sex trade activity.

On August 4, 2009, Adam Hesse took a call from an anonymous caller who alleged seeing a person who had been sitting in the employer's company van get out and make obscene gestures to the caller. The caller provided the license plate number of the van Mr. Routt had at the time. The caller refused to provide his name. Mr. Routt had been at the location in question on his lunch break, but denies making any obscene gestures toward anyone. At the time of the call, the employer dismissed the allegation. The employer reconsidered the allegation after the August 18 allegation.

### **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 employer has failed to produce sufficient evidence, and sufficiently direct and satisfactory evidence, to establish misconduct in connection with either alleged incident. The employer refused to disclose the identity of the off-duty officer who alleged to the employer that Mr. Routt had engaged in illegal conduct during working hours and with the use of the employer’s van on August 18, 2009. The employer’s refusal to identify the complainant and/or provide testimony from the complainant raises serious questions regarding what weight the administrative law judge should give to the allegation. The first is why would the employer not be willing to disclose the identity of an alleged law enforcement officer? To the administrative law judge—a former prosecutor—the employer’s position on that matter makes absolutely no sense at all, unless the employer has something to hide that might be detrimental to its case. The employer has not alleged that the alleged off-duty officer was engaged in some covert, undercover surveillance that would be compromised by disclosing his identity. Why would the employer not want to have that person participate in the hearing so he could provide testimony that might give weight to the allegation? Did that person have an axe to grind with Mr. Routt? The tangential question arises as to why the alleged off-duty officer was himself in an area of downtown Waterloo allegedly known for prostitution. Another question that arises is whether the person who made the original allegation about the August 18 conduct was a law enforcement officer at all. A further question that arises is whether there was a third-party allegation at all and/or whether the employer has merely manufactured an allegation. All these questions and more might have been answered, had the employer provided testimony from the one person who allegedly had firsthand knowledge about the alleged misconduct. The employer has denied the administrative law judge a meaningful opportunity to assess the credibility of the alleged witness. As it stands, the employer’s case regarding the August 18 alleged misconduct consists of an allegation devoid of proof. The employer must prove misconduct and do so through an appropriate presentation of evidence. Misconduct cannot be established in this matter.

The administrative law judge must also conclude that the testimony concerning the August 4 alleged misconduct indicates an allegation devoid of proof. The employer appears to have drawn this same conclusion at the time that allegation came to the employer’s attention.

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

**DECISION:**

The Agency representative's September 22, 2009, reference 02, decision 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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