

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**VAHIDIN SPAHIC**

Claimant

**APPEAL NO. 07O-UI-04661-JT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DES MOINES IND COMMUNITY SCHO DIST**

Employer

**OC: 01/21/07 R: 02  
Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

Des Moines Independent Community School District filed a timely appeal from the February 13, 2007, reference 01, decision that allowed benefits. After due notice was issued, an in-person hearing was held on July 10, 2007. Claimant Vahidin Spahic participated. Catherine McKay, Risk Manager, represented the employer and presented additional testimony through Amanda Easton, Human Resources Investigations Specialist. Bosnian-English Interpreter Zijo Sucasca assisted with the hearing. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Six and A through D into evidence.

**ISSUE:**

Whether the claimant was discharged for a current act of misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Vahidin Spahic was employed by the Des Moines Independent Community School District from October 1, 2002 until January 19, 2007, when Jerry Weiss, Deputy Director of Management, and Doug Williard, Deputy Director of Human Resources, discharged him. Mr. Spahic had commenced the employment as a part-time bus driver. At the time of the separation, Mr. Spahic was employed full-time in the employer's Central Stores. Mr. Spahic's immediate supervisor was Jack Simpson. Mr. Spahic is a Bosnian refugee and a non-native English speaker.

The employer discharged Mr. Spahic in response to a harassment complaint, or complaints, received from Transportation Bus Driver Julie Stanley. On October 3, 2006, Ms. Stanley reported to Sheila Mason, Executive Director of Management Support Services, the details of an October 3 incident involving Mr. Spahic. On October 17, Ms. Stanley brought a second complaint about Mr. Spahic to the attention of Sheila Mason. This matter concerned an incident on October 17. Both incidents involved Mr. Spahic approaching Ms. Stanley to request and/or insist that she relay a message to her sister, Rose Ballard. Ms. Ballard, a part-time bus driver,

had provided unsolicited information to the employer as part of a prior sexual harassment complaint against Mr. Spahic. Ms. Ballard was not the complainant in that matter. Mr. Spahic wanted Ms. Stanley's assistance in getting Ms. Ballard to appear at the workplace. Mr. Spahic wanted Ms. Ballard to come to the workplace and provide a statement in front of witnesses to the effect that any prior sexual contact between Mr. Spahic and Ms. Ballard had been consensual.

On October 24, Ms. Stanley brought her complaints to the attention of Amanda Easton, Human Resources Investigations Specialist. On October 24, Ms. Easton prepared and Ms. Stanley signed a written statement concerning both incidents. On October 25, Ms. Easton notified Mr. Spahic by certified mail that Ms. Stanley had filed a harassment complaint against Mr. Spahic. The letter set forth the following:

Mr. Spahic,

I have received a harassment complaint filed against you by Julia Stanley, Transportation Bus Driver. I will require a response from you regarding this allegation. As a District Employee, you are required to cooperate fully, accurately and truthfully with any allegation conducted by the Human Resources Department accurately and truthfully.

You have ten business days from the receipt of this letter to have an interview completed. If you do not complete your interview within ten business days, you will subject yourself to disciplinary action, up to and including termination. This is an investigative interview that could lead to disciplinary action. You are allowed to bring representation for this interview.

Please contact me to schedule an interview so that I may take a statement about this very important issue. Please contact my desk phone at 515-242-7841, Monday through Friday from 8:00am to 4:30pm.

Sincerely,

Amanda Easton  
Human Resources Investigations Specialist  
Human Resources Management

Ms. Easton interviewed additional individuals and collected written statements. Mr. Spahic responded to Ms. Easton's letter and submitted to a timely interview. Ms. Easton re-interviewed Ms. Stanley on one or more occasions. The last witness statement concerning the October 3 and October 17 incidents was signed on November 29, 2006. On January 5, 2007, Ms. Easton completed a written report concerning her investigation of the October 3 and October 17 incidents involving Mr. Spahic and Ms. Stanley forwarded the report to Jerry Weiss, Deputy Director of Management.

On January 19, 2007, Jerry Weiss, Deputy Director of Management, Doug Williard, Deputy Director of Human Resources, and a union representative met with Mr. Spahic. During the meeting, Mr. Weiss told Mr. Spahic that the employer had concluded that Mr. Spahic harassed Ms. Stanley. Mr. Weiss told Mr. Spahic that the employer was discharging Mr. Spahic based on the founded harassment allegation. At this January 19 meeting, the employer notified Mr. Spahic, for the first time, that his conduct towards Ms. Stanley on October 3 and 17 subjected him to possible discharge.

The prior investigation into alleged sexual harassment has been based on a complaint brought by Central Stores Driver Bobbi Speers. Ms. Speers alleged to Ms. Easton in May 2006 that Mr. Spahic had sexually harassed her on February 12, 2004. On August 25, 2006, Ms. Easton submitted her investigation report concerning the sexual harassment allegation and concluded the alleged incident had occurred. Ms. Easton made her conclusion despite the significant time lapse, despite concerns regarding the complainant's credibility, and despite the presence of hostility Ms. Speers and others had directed at Mr. Spahic because they believed the employer had followed the collective bargaining agreement in placing Mr. Spahic in the Central Stores position. It was during this investigation that Ms. Ballard provided unsolicited information to Ms. Easton about Mr. Spahic. As a result of Ms. Easton's report, the employer suspended Mr. Spahic for three days in September 2006. The employer advised Mr. Spahic that further similar conduct would subject Mr. Spahic to discharge from the employment. While the earlier allegation concerned sexual harassment, Ms. Stanley's complaint concerned Mr. Spahic's overbearing demeanor and/or conduct in requesting assistance from Ms. Stanley.

## **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 evidence in the record fails to establish a “current act” upon which a disqualification for benefits must be based. The evidence indicates that the first complaint from Ms. Stanley came to the attention of the employer on October 3. The evidence indicates that the second complaint from Ms. Stanley came to the attention of the employer on October 17. The evidence indicates that the employer delayed its response to the complaints until October 24. The evidence indicates that Ms. Easton’s October 24 letter to Mr. Spahic did not provide notice to Mr. Spahic that he faced the possibility of discharge in connection with his October 3 and October 17 contact with Ms. Stanley. The threat of discharge contained in the letter was limited, on its face, to Mr. Spahic’s failure to cooperate with the investigation in a timely fashion. Mr. Spahic cooperated in a timely fashion. Even if Ms. Easton’s letter of October 24 had provided sufficient notice of the possibility of discharge, the October 3 complaint was already too old to constitute a “current act.” The evidence indicates that the complaints filed by Ms. Stanley were dissimilar to the prior sexual harassment complaint. In any event, warnings Mr. Spahic received prior to the October 3 or October 17 incidents would not satisfy the notification required by 871 IAC 24.32(8) and Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988). The evidence indicates that the employer took an unreasonable period to complete an investigation and move forward with discipline. Though Ms. Easton received her last written statement on November 29, it was not until January 5, that Ms. Easton submitted her findings. There was additional delay between January 5 and January 19, the day on which the employer first notified Mr. Spahic that he faced possible discharge as a consequence of his actions on October 3 and October 17. All of the delay from October 3 and October 17 onward was attributable to the employer.

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

**DECISION:**

The Agency representative's February 13, 2007, reference 01, decision is affirmed. 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

jet/pjs