

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DYKSTRA, ROGER, D**  
Claimant

**APPEAL NO. 13A-UI-06093-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**EARTHGRAINS BAKING COMPANIES INC**  
Employer

**OC: 01/20/13**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Roger Dykstra filed a timely appeal from the May 13, 2013, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on June 28, 2013. Mr. Dykstra participated and presented additional testimony through Mike Stanfield. The employer indicated in writing on June 26, 2013 that the employer was electing not to participate in the hearing and that the employer was no longer contesting the claimant's eligibility for unemployment insurance benefits.

**ISSUE:**

Whether the claimant was suspended and/or 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: Roger Dykstra was employed by Earth Grains Baking Companies, Inc., as a full-time route sales specialist from 1984 until April 26, 2012, when Jim Bland, District Manager, notified him that he was suspended without pay. The suspension without pay was in response to Mr. Dykstra being arrested on a warrant and briefly incarcerated. The arrest warrant and incarceration were not related to the employment. The employer continued Mr. Dykstra on an unpaid suspension until April 17, 2013, when the employer mailed notice to Mr. Dykstra that he was discharged from the employment. Mr. Dykstra grieved the discharge. The employer did not change its position. Mr. Dykstra withdrew his challenge to the discharge last week.

Mr. Dykstra established a claim for unemployment insurance benefits that was effective January 20, 2013.

## REASONING AND CONCLUSIONS OF LAW:

Iowa Administrative Code section 871 IAC 24.32(9) provides as follows:

Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

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) alone. 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).

Violation of a specific work rule, even off-duty, can constitute misconduct sufficient to disqualify a claimant from unemployment insurance benefits. See Kleidosty v. Employment Appeal Board, 482 N.W.2d 416, 418 (Iowa 1992). But the employer must have a work rule that covers the off-duty conduct.

The employer waived its participation in the hearing and thereby failed to present any evidence to support the allegation that Mr. Dykstra was suspended for misconduct in connection with the employment or that misconduct in connection with the employment was the basis for the April 17, 2013 letter notifying him that he was discharged. The evidence indicates that Mr. Dykstra was actually discharged effective April 26, 2012, when he was placed on an indefinite "suspension" that ended up lasting about a year. The evidence establishes no misconduct *in connection with the employment*. The evidence establishes no employer work rule that would subject Mr. Dykstra to discipline within the employment for off-duty conduct.

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

**DECISION:**

The Agency representative's May 13, 2013, reference 02, decision is reversed. The claimant was suspended and 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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