

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

ROBERT D ENGELSON  
2109 W 5<sup>TH</sup> ST  
SIOUX CITY IA 51103

SECURITAS SECURITY SERVICES  
USA INC  
c/o TALX EMPLOYER SERVICES  
PO BOX 429503  
CINCINNATI OH 45244-9503

SECURITAS SECURITY SERVICES  
USA INC  
c/o DAVID WILLIAMS  
TALX EMPLOYER SERVICES  
3799 VILLAGE RUN DR #511  
DES MOINES IA 50317

Appeal Number: 06A-UI-00011-RT  
OC: 11-13-05 R: 01  
Claimant: Respondent (1)

**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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct  
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Securitas Security Services USA, Inc., filed a timely appeal from an unemployment insurance decision dated December 19, 2005, reference 02, allowing unemployment insurance benefits to the claimant, Robert D. Engelson. After due notice was issued, a telephone hearing was held on January 18, 2006, with the claimant participating. Jim Buser, Field Manager, participated in the hearing for the employer. The employer was represented by David Williams of TALX Employer Services. Employer's Exhibits One and Two were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. At

9:12 a.m. on January 10, 2006, the claimant spoke to the administrative law judge and requested the hearing be rescheduled because he had to pick up his daughter at school at 1:30 p.m. However, because the claimant thought he could be back home by 2:00 or 2:05 or 2:10 p.m., the administrative law judge denied the claimant's request to reschedule the hearing but agreed to wait five or ten minutes for the claimant to arrive at home, if necessary. The administrative law judge called the claimant at 2:03 p.m. and he was present at his home and participated in the hearing.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One and Two, the administrative law judge finds: The claimant was employed by the employer as a full time security officer from July 17, 1997 until he was discharged on November 14, 2005. The claimant was discharged for an arrest and conviction for misdemeanor theft. On April 15, 2005, the claimant was arrested for misdemeanor theft. He informed the employer the next morning well within the three day requirement of the employer's policies. The claimant then pled guilty and was fined and therefore convicted of misdemeanor theft on April 21, 2005. He told the employer, at least by the next morning again, well within the employer's three day requirement. The employer has a policy as shown at Employer's Exhibit One that upon an arrest or conviction of any crime the employee must notify the employer within three days. The claimant complied with the policy both for his arrest and conviction. When the claimant informed the employer of his conviction he was told to wait and see if a background check was run and not to worry about it until it came up. Thereafter the claimant continued to work for the employer. The claimant was reassigned to another client, Great West Insurance Company, approximately two weeks before his discharge. Great West Insurance Company required a criminal background check. One was run on the claimant approximately November 8 or 9, 2005 and the criminal background check revealed the arrest and conviction of misdemeanor theft. The claimant was then discharged on November 14, 2005. The employer's witness, Jim Buser, Field Manager, testified that he was not aware of any rule that required that an employee be immediately discharged for a conviction of a crime including fifth degree theft but learned from the employer's corporate office that such was required and the claimant was discharged. Pursuant to his claim for unemployment insurance benefits filed effective November 13, 2005, the claimant has received unemployment insurance benefits in the amount of \$2,153.00 as follows: \$164.00 for benefit week ending November 19, 2005 and \$221.00 per week for nine weeks from benefit week ending November 26, 2005 to benefit week ending January 21, 2006.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. He is 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, (8) provide:

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).

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The parties agree, and the administrative law judge concludes, that the claimant was discharged on November 14, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for a current act of disqualifying misconduct. It is well established that the employer has the burden to prove a current act of disqualifying misconduct. See Iowa Code section 96.6 (2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for a current act of disqualifying misconduct. There was little difference in the evidence between the parties. The claimant was arrested on April 15, 2005 for fifth degree theft and then he pled guilty and was convicted of such offense on April 21, 2005. The claimant properly notified the employer within three days of both his arrest on April 15, 2005 and of his conviction on April 21, 2005. The employer requires such a notification within three days as shown at Employer's Exhibit One. However, the claimant was not discharged at that time. Rather he was told to wait and see if a background check was run or to wait until "it" comes up. Approximately two weeks

before his discharge the claimant was reassigned to another client, Great West Insurance Company who required a criminal background check of all security officers. A criminal background check was run on the claimant on November 8 or 9, 2005 and the background check revealed the arrest and conviction for misdemeanor theft. The claimant was then discharged.

The administrative law judge first concludes that there is not a preponderance of the evidence that the claimant violated any employer's policies. The employer's policy as shown at Employer's Exhibit One requires that an employee notify the employer of an arrest and/or conviction of any crime during the course of the employee's employment. The claimant properly notified the employer here both of his arrest and of his conviction. There is nothing in the policy that specifically states that a criminal conviction will result in discharge. The policy does state that criminal convictions have an impact on the employee's ability to carry a security officer's license and the employment will be terminated if a license is revoked. The administrative law judge does not believe that there is a preponderance of the evidence that the claimant violated these policies. The employer's witness, Jim Buser, credibly testified that he did not know of any policy of the employer that required an automatic discharge upon the arrest or conviction of any crime including fifth degree theft. Mr. Buser did testify that he was informed by the corporate offices that a conviction of theft caused the claimant to lose his license as a security officer and therefore he had to be discharged. This may be true but should have been set out more clearly in the rules. Accordingly, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant committed any deliberate act constituting a material breach of his duties and obligations arising out of his worker's contract of employment or that evinced a willful or wanton disregard of the employer's interests or that was carelessness or negligence in such a degree of recurrence so as to establish disqualifying misconduct.

More compellingly, there is not a preponderance of the evidence that the claimant was discharged for a current act of misconduct. A discharge for misconduct cannot be based on past acts. Clearly, the claimant's arrest and conviction were past acts both occurring in April of 2005. The claimant did what he was supposed to do under the employer's policies and notified the employer both of the arrest and the conviction within three days. The claimant was not discharged but allowed to continue to work until November 14, 2005, almost six months after his conviction. The claimant was then discharged. Even assuming that the claimant's arrest and conviction were disqualifying misconduct, they were certainly past acts of disqualifying misconduct and, standing alone, cannot establish disqualifying misconduct that would disqualify the claimant from receiving unemployment insurance benefits. There is no evidence of any current act of disqualifying misconduct. Accordingly, the administrative law judge concludes that the act giving rise to the claimant's discharge was a past act and cannot be disqualifying misconduct.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and certainly not for a current act of disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct of a current nature so as to warrant the disqualification to receive

unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided he is otherwise eligible.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$2,153.00 since separating from the employer herein on or about November 14, 2005 and filing for such benefits effective November 13, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

#### DECISION:

The representative's decision of December 19, 2005, reference 02, is affirmed. The claimant, Robert D. Engelson, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for an act of disqualifying misconduct and certainly not for a current act of disqualifying misconduct. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

kkf/tjc