

**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**

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**Appeal Number: 04A-UI-03086-M
OC: 02/15/04 R: 02
Claimant: Appellant (2)**

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, 4th 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated March 12, 2004, reference 02, which held claimant ineligible for unemployment insurance benefits. After due notice, an in-person hearing was scheduled for and held on April 13, 2004. Claimant participated personally and was represented by Susan Stockdale, Attorney at Law. Employer participated by George Pallos, Editor; Chris Holder, Account Executive; Lisa Gilley, Secretary; Ann Quinlan, Account Representative; Mark McNulty, Account Executive; and David Sweeney, Management Account Executive. Exhibits One and A were admitted into evidence.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on February 9, 2004.

Employer discharged claimant on February 9, 2004 because claimant made a business proposal to five coworkers. Claimant worked for this company in graphic arts and typesetting. Claimant wanted to start his own publication focusing on outdoor sports. Claimant after hours and during work breaks would talk to co-workers about his dream. Claimant asked the coworkers to keep this information confidential. The coworkers did not heed the warning. Employer got wind of the budding business idea and discharged claimant for trying to steal the employees. Claimant did not offer to hire the employees for full time work. Claimant's proposal was that they go into a partnership type arrangement and work the business after hours and weekends. This was an offer to moonlight.

Employer has no policy prohibiting solicitation of employees to moonlight or to engage in self-employment. Employer has no policy prohibiting competing in publishing businesses. There is no general conflict of interest policy. Employer did not solicit a no compete covenant or contract from any employee. No warnings had been issued to claimant for such activity or self-employment issues.

The proposed publication would have some modest overlap of advertisers but in general it was distinct and different from the employer's farm publication. The overlap of advertisers is incidental at best.

REASONING AND CONCLUSIONS OF LAW:

The issue in this matter is whether claimant was discharged for misconduct.

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.

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).

871 IAC 24.32(8) provides:

(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.

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning conflicts of interest. Claimant was not warned concerning this policy.

The last incident, which brought about the discharge fails to constitute misconduct because employer has no rule or policy prohibiting such conduct. Furthermore, claimant had no warnings on his record placing him on notice that he would be discharged for this type of behavior. It is also noted that there was little overlap in advertisers. The conflict of interest would have come if the publication took off and all the part-time work became full time. Claimant would have then stole the intellectual strength from the employer by taking most of the experienced staff. That result was speculative at best. Claimant did not make any proposal to have the employees quit their current employment. The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated March 12, 2004, reference 02, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

mdm\kjf