

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TED NUESE
Claimant

APPEAL NO. 10A-UI-04110-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CONLIN PROPERTIES INC
Employer

**Original Claim: 01/31/10
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Ted Nuese filed a timely appeal from the March 9, 2010, reference 02, decision that denied benefits. After due notice was issued, a hearing was commenced on April 29, 2010 and completed on May 5, 2010. Mr. Nuese participated. James “J.B.” Conlin represented the employer and presented additional testimony through Mary Stoltenberg and Kris Saddoris. Exhibits One through Eight were received into evidence.

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: Ted Nuese was employed by Conlin Properties, Inc., as the full-time Director of Human Resources from 2005 until January 29, 2010, when the employer discharged him the employment. On January 14, 2009, the employer suspended Mr. Nuese with pay while the employer had a third-party investigator investigate a female employee’s allegation that Mr. Nuese had sexually harassed the employee. It was necessary for the employer to bring in a third-party investigator due to Mr. Nuese’s position as Director of Human Resources. The investigator had not yet completed the investigation into the alleged sexual harassment at the time the employer discharged Mr. Nuese for other matters.

In the course of the investigation, the employer learned that Mr. Nuese had repeatedly borrowed money from the female employee who had alleged sexual harassment. Mr. Nuese had in one instance borrowed money from the employee to post bail. The female employee was a subordinate employee within the company. Though Mr. Nuese did not directly supervise the employee, Mr. Nuese was an integral part of the management team and involved, to one extent or another, in all human resources matters. J.B. Conlin, President, had previously lent money to Mr. Nuese. When Mr. Nuese borrowed money from the subordinate employee, he did so in part to avoid returning to Mr. Conlin. During the course of the investigation, the employer learned Mr. Nuese had spent the night at the employee’s home. During the course of the investigation, the employer also learned that Mr. Nuese had continued to consume alcohol, including consuming alcohol with the subordinate female employee. This conduct occurred despite Mr. Nuese’s prior agreement with the employer that he would cease all alcohol consumption and report any alcohol consumption to the

employer. Mr. Nuese had an ongoing issue with alcohol that interfered with his attendance and work responsibilities. Mr. Nuese had agreed to forego consumption of alcohol and report consumption of alcohol to the employer as conditions of his continued employment.

Mr. Nuese had written the employer's employee handbook. Mr. Nuese was the person primarily responsible for training others on the employer's policies and enforcing the handbook policies. Included in the employer's written standard of conduct was a provision that, "[T]he Company will not tolerate any behavior or conduct that might interfere with our daily operations, discredit the Company, or be offensive to customers, vendors, suppliers, or other employees." Mr. Nuese understood that he was a representative of the company at all times, whether he was on the clock or off-duty. Mr. Nuese understood that his conduct impacted on the company for good or ill.

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).

The weight of the evidence establishes misconduct in connection with the employment that disqualifies Mr. Nuese for unemployment insurance benefits. Mr. Nuese was no ordinary employee. Rather, Mr. Nuese was the Director of Human Resources. Mr. Nuese clearly understood how integral his position was to the employer's business operations and understood that he represented the employer at all times when interacting with company employees. Mr. Nuese also understood that whether he directly supervised an employee or not, he was an integral part of the executive team ultimately responsible for supervising all employees. The conduct that prompted the employer to discharge Mr. Nuese from the employment cannot be characterized as mere good faith errors in judgment. Mr. Nuese was the person who had written the employee handbook, trained others on the content of the employee handbook, and primarily enforced the employee handbook. Mr. Nuese's knowledge, expertise, and duties as Director of Human Resources did not stop with the letter of the handbook he had written. As Director of Human Resources, Mr. Nuese was the person primarily charged with maintaining appropriate boundaries in the workplace to enable a fair and functional work environment. The weight of the evidence indicates that Mr. Nuese knew full well that he was acting contrary to the interests of the employer when he engaged in the conduct that led to his termination from the employment. Mr. Nuese's various and repeated liberties indicated wanton disregard of the employer's interests.

The weight of the evidence establishes multiple "current acts" of misconduct. The conduct that prompted the discharge did not come to the employer's attention until the employer commenced its investigation. There was inherent delay in the investigation process, specifically because of the nature of Mr. Nuese's position as Director of Human Resources.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Nuese was discharged for misconduct. Accordingly, Mr. Nuese is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Nuese.

DECISION:

The Agency representative's March 9, 2010, reference 02, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw