

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TERRY G RECKER**  
Claimant

**APPEAL NO. 09A-UI-14538-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MID IOWA REFRIGERATION INC  
GOODWIN TUCKER GROUP**  
Employer

**OC: 08/23/09  
Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Terry Recker filed a timely appeal from the September 18, 2009, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on October 26, 2009. Mr. Recker participated. Natasha Hughes, Human Resources Director, represented the employer. Exhibits A through J and Y 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: Terry Recker was employed by Mid Iowa Refrigeration, Inc./Goodwin Tucker Group as a full-time service technician on two distinct occasions. The most recent period of employment began on September 5, 2008 and ended on August 25, 2009, when the employer discharged him from the employment because he was legally prohibited from responding to some service calls.

Mr. Recker's duties involved repairing and installing HVAC and refrigeration equipment. Mr. Recker was on-call 24 hours a day, seven days a week. Mr. Recker would generally work alone on his assigned service calls. Mr. Recker's assigned duties required him to be available for service calls to restaurants, schools, nursing homes, jails, or any other commercial establishment that had a kitchen. Mr. Recker was one of four service techs assigned to serve the Cedar Rapids metropolitan area. Mr. Recker could also be assigned to service calls outside the Cedar Rapids area. Mr. Recker's immediate supervisor was Dee Holt, Service Manager. While Mr. Recker worked in the Cedar Rapids area, Ms. Holt worked in Des Moines.

In April 2009, Mr. Recker was convicted of the class D felony criminal offense of Lascivious Acts with a Child. The crime occurred outside of work. Mr. Recker received a suspended prison sentence, was placed on probation to the Department of Correctional Services for three years, and was restricted from having unsupervised contact with persons under 18 years old.

Mr. Recker was also required to register as a sex offender. Mr. Recker withheld from the employer information concerning the conviction, the probation, the restrictions on his conduct, or being placed on the Sex Offender Registry. Mr. Recker was required to wear a tracking bracelet. Mr. Recker had a 10:30 p.m. curfew. Mr. Recker could not leave the county or the state without prior approval from his probation officer.

Until August 20, 2009, Mr. Recker was able to arrange his assignments so that he would not have to violate the terms of his sentence or probation. But on August 20, the dispatcher assigned Mr. Recker to a service call at a school. Mr. Recker contacted his supervisor and explained why he was not allowed to respond to the school. Mr. Recker told the employer for the first time about his April 2009 conviction. Mr. Recker explained that he was not allowed to enter schools, daycares, jails or prisons, or otherwise have unsupervised contact with minors. Mr. Recker sent the employer a copy of his Judgment and Sentencing and related materials. The employer concluded it could no longer use Mr. Recker's services. Ultimately, John Gillotti, President, made the decision to discharge Mr. Recker from the employment. The employer was concerned not only with the restriction on the service calls to which Mr. Recker could respond. The employer was also concerned with the employer's liability in the event that Mr. Recker reoffended in the course of the employment after the employer was aware of his conviction and sex offender status.

#### **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 administrative law judge notes that testimony or other statement from Mr. Recker's probation officer was conspicuously absent from the evidence.

In Cook v. Iowa Department of Job Service, 299 N.W.2d 698 (Iowa 1980), the Iowa Supreme Court held that when a claimant lost his insurability, and thereby lost his ability to perform his duties, because of traffic tickets he accumulated, the loss was self-inflicted and disqualifying misconduct. The question for the administrative law judge is whether the Cook ruling applies also in the present case, where the claimant lost a portion of his employability due to a felony criminal conviction and sex offender status. In Cook, the claimant's employment required that he be able to operate motor vehicles. Through commission of traffic offenses and resulting convictions, the claimant rendered himself incapable of continuing in the employment. In the present case, the claimant rendered himself incapable of fulfilling significant aspects of the employment by means of serious criminal conduct he perpetrated. The administrative law judge concludes that the reasoning in the Cook decision applies here as well.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Recker was discharged for misconduct. Accordingly, Mr. Recker 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. Recker.

**DECISION:**

The Agency representative's September 18, 2009, 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs