

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHRISTOPHER M ROSSIO

Claimant

APPEAL NO. 15A-UI-06851-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

UNITED STATES CELLULAR CORP

Employer

OC: 05/17/15

Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.5(2)(b) & (c) Discharge for Gross Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 3, 2015, reference 01, decision that allowed benefits to the claimant, provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged on April 30, 2015 for no disqualifying reason. After due notice was issued, a hearing was held on July 15, 2015. Claimant Christopher Rossio did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Larry Post represented the employer and presented additional testimony through Darrell Philos and Mike Hicks. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant (DBRO), which record indicates that no benefits have been disbursed to the claimant in connection with the claim that was effective May 17, 2015. Exhibit One was receive into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant was discharged for gross misconduct in connection with the employment.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Christopher Rossio was employed by United States Cellular Corporation as a part-time retail wireless consultant at the employer's West Burlington location from 2013 until April 29, 2015, when Larry Post, Store Manager, and Mike Hicks, Area Sales Manager, discharged him for multiple thefts from the employer. On April 23, 2015, Mr. Post was reviewing an employee adjustment record when he discerned questionable credits that Mr. Rossio had made to a customer's account in recent months. Mr. Rossio had credited the account \$85.00 in January 25, had credited the account \$80.58 on March 11, and had credited the account

\$125.00 on April 13. Upon further review of the customer's account, Mr. Post saw that the same customer had used seven \$100.00 gift cards to purchase an iPad from the employer. The gift cards were part of a holiday promotion and were supposed to be available only to those customers who activated a new line. The customer in question had not activated any lines. Mr. Post met with Mr. Rossio on April 23, 2015. Mr. Rossio denied any knowledge of the transactions. Mr. Post directed Mr. Rossio to review the account. Mr. Rossio reported later that day that he did not recall anything about the transactions. Mr. Rossio was intentionally dishonest with Mr. Post during both conversations on April 23, 2015.

Mr. Post further investigated Mr. Rossio's transactions and discovered that Mr. Rossio had used two \$100.00 gift cards to make payments on his father's account on November 22, 2014. Mr. Rossio had also used seven \$100.00 gift cards on December 11, 2014, to obtain an iPhone for himself. On or about April 26, Mr. Post contacted Darrell Philos, Corporate Security Loss Prevention Manager, and told him of his findings.

On April 29, Mr. Philos and Mr. Post met with Mr. Rossio so that Mr. Philos could conduct an investigative interview. Mr. Rossio initially attempted to mislead the employer. Mr. Rossio ultimately admitted to the conduct the employer had uncovered and brought to the employer's attention additional unauthorized use of the \$100.00 gift cards to obtain merchandise and/or service for friends and/or family. Mr. Rossio told the employer that he thought he had used about 25 \$100.00 gift cards. After Mr. Rossio had confessed to the thefts, Mr. Rossio wrote and signed a written statement in which he admitted to the thefts from the employer. Mr. Post and Mr. Hicks signed the document as witnesses.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Code § 96.5-2-b-c 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:

b. Provided further, If gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers.

c. Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act. Determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith.

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).

Iowa Code section 714.1(1) and (2) provide as follows:

714.1 Theft defined.

A person commits theft when the person does any of the following:

1. Takes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof.
2. Misappropriates property which the person has in trust, or property of another which the person has in the person's possession or control, whether such possession or control is lawful or unlawful, by using or disposing of it in a manner which is inconsistent with or a denial of the trust or of the owner's rights in such property, or conceals found property, or appropriates such property to the person's own use, when the owner of such property is known to the person.

Iowa Code section 714.2 provides, in relevant part, as follows:

714.2 Degrees of theft.

1. The theft of property exceeding ten thousand dollars in value is theft in the first degree. Theft in the first degree is a class "C" felony.
2. The theft of property exceeding one thousand dollars but not exceeding ten thousand dollars in value...is theft in the second degree. Theft in the second degree is a class "D" felony. ...
3. The theft of property exceeding five hundred dollars but not exceeding one thousand dollars in value...is theft in the third degree. Theft in the third degree is an aggravated misdemeanor.
4. The theft of property exceeding two hundred dollars in value but not exceeding five hundred dollars in value is theft in the fourth degree. Theft in the fourth degree is a serious misdemeanor.
5. The theft of property not exceeding two hundred dollars in value is theft in the fifth degree. Theft in the fifth degree is a simple misdemeanor.

Iowa Code section 714.3 provides as follows:

714.3 Value.

The value of property is its highest value by any reasonable standard at the time that it is stolen. Reasonable standard includes but is not limited to market value within the community, actual value, or replacement value.

If money or property is stolen from the same person or location by two or more acts, or from different persons by two or more acts which occur in approximately the same location or time period, or from different locations by two or more acts within a thirty-day period, so that the thefts are attributable to a single scheme, plan, or conspiracy, these acts may be considered a single theft and the value may be the total value of all the property stolen.

"Indictable offense" means an offense other than a simple misdemeanor. Iowa Code section 801.4(8).

The evidence in the record establishes that Mr. Rossio committed theft from the employer by misappropriating gift cards belonging to the employer and converting them to his personal use. Mr. Rossio's conversion of the gift cards in two instances involved use of \$700.00 worth of gift cards. Each of those thefts constituted Theft in the Third Degree, an aggravated misdemeanor and an indictable offense. The evidence in the record establishes that Mr. Rossio committed

theft from the employer by giving a customer multiple unauthorized discounts that cost the employer \$290.58 in revenue. In addition to committing several thefts from the employer, Mr. Rossio was intentionally dishonest with the employer three times during the employer's investigation of the matter.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Rossio was discharged for misconduct that also constituted gross misconduct in connection with the employment. Mr. Rossio is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Rossio must meet all other eligibility requirements. In addition, because the discharge was for gross misconduct, Workforce Development shall cancel Mr. Rossio's wage credits earned from all employers prior to the April 30, 2015, discharge from United States Cellular Corporation.

Because no unemployment insurance benefits have been paid to Mr. Rossio, there is no overpayment issue to address.

DECISION:

The June 3, 2015, reference 01, decision is reversed. The claimant was discharged for misconduct that also constituted gross misconduct in connection with the employment. The claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. Workforce Development shall cancel the claimant's wage credits earned from all employers prior to the April 30, 2015 discharge from United States Cellular Corporation.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs