

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TYLER DEVILBISS**  
Claimant

**APPEAL NO. 11A-UI-02164-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**QUEST CORPORATION**  
Employer

**OC: 01/02/11  
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Quest Corporation filed a timely appeal from a representative's decision dated February 15, 2011, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice, a telephone hearing was held on March 21, 2011. The claimant participated personally. The employer participated by Mr. Shaun Lampel, Hearing Representative and witnesses, Todd Welch, Telesales Manager 1 and Anne Rodriguez, Telesales Manager 2.

**ISSUE:**

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

**FINDINGS OF FACT:**

The administrative law judge, having considered the evidence in the record, finds: Tyler Devilbiss was employed by Quest Corporation from February 15, 2010 until January 7, 2011 when he was discharged from employment. Mr. Devilbiss held the position of telesales and services assistant and was employed on a full-time basis. The claimant was paid by the hour plus commissions. His immediate supervisor was Todd Welch.

The claimant was discharged when the most recent review of his work showed that he had not met the minimum 91 percent average for call availability and the employer also felt that the claimant had not sufficiently offered other products or services during a monitored call.

Mr. Devilbiss had been issued a warning on December 7, 2010 warning him of the employer's call availability expectations and informing the claimant that his employment was in jeopardy.

During the final monitored period Mr. Devilbiss' call availability time had been negatively impacted by an inbound call that had accidentally been routed to the claimant although he was engaged in "after call work" on a previous sale. Mr. Devilbiss alerted his immediate supervisor to the potential problem with his call availability percent because of the incident.

In the telephone call monitored for performance evaluation Mr. Devilbiss made an inquiry about selling additional products or services but did not continue or attempt to offer the services or products based upon the customer's response.

**REASONING AND CONCLUSIONS OF LAW:**

The question before the administrative law judge is whether the evidence in the record establishes intentional misconduct sufficient to warrant the denial of unemployment insurance benefits. It does 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 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 insurance benefits. Misconduct serious enough to warrant the discharge of an employee may not necessarily serious enough to warrant the denial of unemployment insurance 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 a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

In the case at hand the evidence in the record establishes that although Mr. Devilbiss was attempting to the best of his ability to meet the employer's expectations, he was unable to do so largely due to factors beyond his control. During the final period of monitor Mr. Devilbiss was unable to reach 91 percent availability for calls expected by the employer because the claimant had inadvertently been routed an inbound call. The inbound call negatively impacted the claimant's average because the claimant was to be utilizing the time to complete duties on a previous call. Mr. Devilbiss acted reasonably in immediately alerting his supervisor to the incident and the potential affect upon Mr. Devilbiss' availability percentage.

Mr. Devilbiss also was discharged because the employer believed that he had failed to offer additional products or services as required during each call. The claimant testified that he had made an offer of products and services but did not continue after he received information from the caller that led Mr. Devilbiss to reasonably conclude that repetitively offering these products or services again would be to no avail.

The question before the administrative law judge in this case is not whether the employer had a right to discharge Mr. Devilbiss for these reasons but whether the discharge took place under disqualifying conditions within the meaning of the Employment Security Act. While the decision to terminate Mr. Devilbiss may have been a sound decision from a management viewpoint, intentional disqualifying misconduct sufficient to warrant the denial of unemployment insurance benefits has not been shown. Benefits are allowed providing the claimant is otherwise eligible.

**DECISION:**

The representative's decision dated February 15, 2011, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

---

Terence P. Nice  
Administrative Law Judge

---

Decision Dated and Mailed

css/css