

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DAMITA WHITLOCK**  
Claimant

**APPEAL NO: 09A-UI-07636-BT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**QWEST CORPORATION**  
Employer

**OC: 04/19/09**  
**Claimant: Respondent (1)**

Iowa Code § 96.5(2)(a) - Discharge for Misconduct

**STATEMENT OF THE CASE:**

Qwest Corporation (employer) appealed an unemployment insurance decision dated May 15, 2009, reference 02, which held that Damita Whitlock (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 11, 2009. The claimant participated in the hearing. The employer participated through Anne Rodriguez, Telesales Manager and Steven Zaks, Employer Representative. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

The issue is whether the employer discharged the claimant for work-related misconduct?

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time customer sales and service associate from September 10, 2007 through April 21, 2009 when she was discharged for providing false information on her employment application. The employer conducted an investigation on February 19, 2009 which included a background check on the claimant. She failed to disclose on her employment application that she had a felony conviction for forgery on her criminal record in Missouri, and had she disclosed that information, she would not have been hired. The claimant denied that the conviction was hers and claimed that it was her best friend's conviction. The employer gave the claimant approximately five or six weeks to provide exculpatory court documents but no certified documents were received to establish the claimant had not been charged or that the conviction was not on her criminal record. In fact, the employer's investigation confirmed the claimant had a felony conviction on her criminal record in Missouri.

The reason the employer conducted a background check was due to the claimant's misappropriation of funds. Based on commissions and other benefits the employer provides its employees, the employer loads funds onto employee's AEIS cards. On November 25, 2008 an

employee erred and mistakenly loaded an excessive dollar amount on approximately ten employees' AEIS cards. Instead of loading \$45.00 onto the claimant's card, \$4,500.00 was loaded. Emails are sent out notifying the employees of AEIS deposits but a second email was immediately sent out to the involved employees and it appears that most of the funds were recovered. However, as of December 3, 2008 the employer was only able to recover \$770.20 from the claimant's AEIS card as the claimant or an authorized user spent \$3,739.80 in that short eight-day period.

The claimant denies that she spent the funds and claimed her daughter in Missouri spent the funds. She never paid back any of the misappropriated funds and the employer began an investigation into the matter on February 19, 2009. The claimant was advised shortly thereafter about the criminal convictions but was not discharged until April 21, 2009 because the employer was giving the claimant some time to obtain certified court documents showing it was a mistake.

### **REASONING AND CONCLUSIONS OF LAW:**

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

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.

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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

The claimant was discharged for misappropriation of funds and providing false information on her employment application when she failed to disclose a felony conviction. Although the employer had sufficient grounds to discharge the claimant, it failed to act in a timely manner. While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge or disciplinary suspension 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 employer knew about the misappropriation of funds on December 3, 2008 and the undisclosed felony at the end of February 2009, but the claimant was not discharged until April 21, 2009. Inasmuch as the employer has not established a current or final act of misconduct, benefits are allowed.

#### **DECISION:**

The unemployment insurance decision dated May 15, 2009, reference 02, is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

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Susan D. Ackerman  
Administrative Law Judge

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Decision Dated and Mailed

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