IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

Appeal Number: 06A-UI-06156-JT
OC: 05/21/06 R: 02
Claimant: Appellant (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Brandi Brown filed a timely appeal from the June 12, 2006, reference 01, decision that denied benefits. After due notice was issued, an in-person hearing was held on July 18, 2006. Ms. Brown participated personally and was represented by Mark Rocha of Communications Workers of America Local 7102. David Williams of TALX UC eXpress/Employers Unity represented the employer and presented testimony through Team Leader Paula Boozell and Telesales Manager Dan Dare. Telesales Manager Brad Gregg appeared at the hearing, but was not called to testify. At the request of the employer, the administrative law judge took official notice of the Agency's administrative, including documents that had been submitted for the fact-finding interview. Three documents from the administrative file were marked for

identification purposes as Department Exhibits D-1, D-2, and D-3. Employer's Exhibit One was received into evidence.

ISSUE:
The issue is whether Ms. Brown was discharged for misconduct that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Brown commenced her most recent period of employment with Qwest on May 2, 2005 and worked as a full-time sales and service consultant until May 19, when Telesales Manager Dan Dare suspended her pending investigation of alleged misconduct. On May 26, Mr. Dare discharged Ms. Brown.

The final incident that prompted the discharge came to the employer's attention on May 16, 2006, when another sales and service consultant complained to Telesales Manager Brad Gregg about Ms. Brown taking steps to avoid work. Ms. Brown's duties involved responding to in-bound customer service calls. The employer's computerized telephone system would prompt Ms. Brown to take a customer call. Ms. Brown was then expected to promptly resolve the customer's concern. If needed, Ms. Brown was to use a second telephone line to make appropriate contact with other departments or companies to resolve the customer's concern. If Ms. Brown placed a customer on hold, the employer's established policy required Ms. Brown to check back in with the customer every 90 seconds. If Ms. Brown's second phone line were in use, this would trigger the computerized telephone system to reroute incoming customer calls away from Ms. Brown to other sales and service consultants.

On May 16, Ms. Brown's coworker complained that Ms. Brown was actively taking steps to avoid receiving calls. Based on this complaint, the employer used the computerized telephone system to log Ms. Brown's telephone activity. The employer logged Ms. Brown's activity for May 16, 17, 18 and 19. The employer noted that on May 16, Ms. Brown had kept several customers on hold for extended periods. Seven customers were placed on hold for five minutes, four customers were placed on hold for 10 minutes, and two customers were placed on hold for 15 minutes. In each instance, Ms. Brown kept the customer on hold without periodically checking in with the customer. Four customers placed on hold for an extended line eventually hung up. In several instances, Ms. Brown had put the customer on hold and activated her second phone line, but not actually called any one on the second phone line. In at least two instances on May 16, Ms. Brown hung up on a customer she had placed on hold. The employer noted that on May 19, Ms. Brown logged into work and then "toggled" on line two for over an hour to avoid taking calls. During the brief period on May 19 when Ms. Brown was taking customer calls, Ms. Brown put four customers on hold for five minutes and one customer on hold for 10 minutes without checking back in with the customer pursuant to the employer's established policy. Two customers placed on hold for an extended period eventually hung up.

Ms. Brown had been allowed to return to the employment on May 2, 2005, under conditions set out in a last chance agreement. A few months prior to Ms. Brown's return, the employer had discharged Ms. Brown for "gross customer abuse." Ms. Brown acknowledges that the conduct that prompted her first discharge and that prompted the last chance agreement had been inappropriate. The last chance agreement indicated that it was in effect for one year and that Ms. Brown could be discharged for any further instances of "gross customer abuse" that

occurred during a one-year period. The one-year period covered by the last chance agreement ended on May 2, 2006.

On May 19, Telesales Manager Dan Dare interviewed Ms. Brown regarding the information contained in the log from May 16-19. Ms. Brown was unable to provide a reasonable explanation for the several extended holds. Ms. Brown acknowledged that she had "toggled" on May 19 to avoid calls. Ms. Brown asserted that she had wanted to take May 19 off "for personal reasons" related to "stress." The employer only allows a set number of employees per shift to take personal leave. Ms. Brown had initially had difficulty getting through to request time off. When Ms. Brown was able to make her request, she learned that no more "personal leave" slots were available.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Brown was discharged for misconduct in connection with the employment. It does.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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 evidence in the record established that Ms. Brown was, in fact, discharged for a current act of misconduct. The greater weight of the evidence indicates that Ms. Brown intentionally placed customers on hold for extended periods without justification for doing so and in violation of the employer's established policy. Ms. Brown hung up on at least two customers she had placed on hold. Ms. Brown intentionally manipulated the employer's automated telephone system to avoid taking calls for over an hour on May 19 without justification. Ms. Brown had been on notice, since the beginning of her second period of employment, that the employer deemed such conduct misconduct that would subject Ms. Brown to possible discharge. The evidence fails to support Ms. Brown's assertion that she "toggled" her second phone line due to stress rising to the level of illness. Instead, the evidence indicates that Ms. Brown had to repeatedly toggle her second phone line nearly constantly to reroute calls away from her workstation for over an hour. This level of activity is inconsistent with the level of activity one might reasonably expect of a person who is ill. The evidence demonstrates willful and wanton disregard of the employer's interests and its customers. The evidence indicates that the behavior that prompted the discharge came to the attention of the employer on May 16, that the employer suspended Ms. Brown on May 19, and that a reasonable person in Ms. Brown's circumstances would have understood at the time of the suspension that discharge was possible.

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

DECISION:

The Agency representative's June 12, 2006, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements.

jt/pjs