

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SANDY K TROBAUGH
Claimant

APPEAL NO. 11A-UI-03730-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

QWEST CORPORATION
Employer

OC: 02/20/11
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 18, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on March 18, 2011. Claimant participated. John O’Fallon of Barnett Associates represented the employer and presented testimony through Tonya Windschitl. Exhibits One through Four 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: Sandy Trobaugh was employed by Qwest Corporation as a full-time customer sales and service associate from 2006 until February 18, 2011, when Tonya Windschitl, Telesales Manager, discharged her from the employment for allegedly adding unnecessary transactions and charges to a customer account. The final incident that triggered the discharge concerned a customer telephone call Ms. Trobaugh handled on February 4, 2011. The customer wanted to restore internet services from a suspended status. Rather than restore services to the existing account, Ms. Trobaugh did a complete disconnect and reconnect. Handling the transaction that way resulted in higher sales figures, and potentially higher commission, for Ms. Trobaugh. Handling the transaction that way also generated an unnecessary \$10.00 charge to the customer’s account and otherwise generated a substantially increased bill for the customer because the customer would be required to pay a month in advance in connection with a newly activated account. The customer called back on February 11 to complain about the unexpected additional fees. Ms. Trobaugh had not reviewed information with the customer regarding the increased bill or activation fee.

On February 17, the employer interviewed Ms. Trobaugh regarding the matter. Ms. Trobaugh alleged that some system error had compelled her to handle the transaction as a disconnect-and-reconnect, rather than restoring services to an existing account by means of a change order. But Ms. Trobaugh was unable to state or recall what the alleged system error

had been. Ms. Trobaugh acknowledged that the action she took on the customer's account violated the employer's established practices and that she should have handled the matter as a change order. Ms. Trobaugh knew how to do a change order to avoid the disconnect-and-reconnect transaction.

The final incident followed to incidents involving similar conduct on the part of Ms. Trobaugh in December 2010. In those instances as well, Ms. Trobaugh had disconnected services and reconnected services, rather than enter the change orders that would have met the customers' needs without generating unnecessary charges and inflated sales for Ms. Trobaugh.

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 weight of the evidence establishes misconduct in connection with the employment. The administrative law judge found much of Ms. Trobaugh's testimony not credible. Ms. Trobaugh alleged that she was intimidated into making untrue admissions of misconduct during the February 17 meeting. The administrative law judge had substantial contact with Ms. Trobaugh at the time of the May 16 hearing and on April 14 when the hearing was initially scheduled. Nothing in Ms. Trobaugh's participation in the unemployment insurance appeal proceedings would lead a reasonable person to believe that Ms. Trobaugh is easily intimidated. The weight of the evidence indicates that Ms. Trobaugh intentionally handled three transactions in a manner that would inflate her sales figures and, potentially, her bonus, while adding unnecessary expense and aggravation to the customer she was supposed to be serving. The weight of the evidence establishes that Ms. Trobaugh knowingly and willingly acted contrary to the interests of the customers involved and contrary to the employer's interest in sustaining good faith relationships with customers.

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

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's March 18, 2011, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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