

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEREK D THOMPSON
Claimant

APPEAL NO. 12A-UI-11162-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

THOMAS L CARDELLA & ASSOCIATES INC
Employer

OC: 08/19/12
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Derek Thompson filed a timely appeal from the September 12, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 10, 2012. Mr. Thompson participated. Barb Toney represented the employer and presented testimony through Corey Nemmers. Exhibits One and Two 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: Derek Thompson was employed by Thomas L Cardella & Associates Inc. as a full-time telemarketer from 2010 until August 22, 2012, when the employer discharged him for processing a sale wherein the customer had declined the product. Mr. Thompson was assigned to the Verizon account. Mr. Thompson's primary duty was to sell additional services to Verizon customers. Mr. Thompson would make 200 to 300 calls per day. The employer has a corporate verifications department that verifies any sale before it is reported to Verizon. On August 22, 2012, during one of the many calls he handled that day, Mr. Thompson did everything appropriate with the call except he mistakenly disposition the call as a sale when no sale had occurred in the customer had declined the product. The misdisposition of the call was not intentional on the part of Mr. Thompson, who knew that any purported sale had to be reviewed and approved by the corporate verifications department.

In making the decision to discharge Mr. Thompson from the employment, the employer considered a couple incidents from March 27, 2012, when Mr. Thompson was assigned to market credit cards. During two calls that day, Mr. Thompson erroneously stated to the person on the other end of the phone call that the person had been preapproved rather than prequalified for the credit card. Preapproval and prequalified are terms of art and are not interchangeable. Prequalified denotes that a person's credit worthiness has undergone some preliminary, threshold screening. Whereas preapproved denotes that the person is much

further along in the approval process. At the time Mr. Thompson made the errors, he did not appreciate that the terms were not interchangeable.

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 evidence in the record establishes three instances in which Mr. Thompson was careless in performing his duties. In connection with the final incident that triggered the discharge, Mr. Thompson was careless only in how he disposition the call. Mr. Thompson carelessly disposition the call as a sale when no sale had occurred. The evidence establishes two instances on March 27, 2012 when Mr. Thompson carelessly used the wrong term, preapproval, when speaking with a prospective customer about prequalification for a credit card. These three incidents, separated by months, and in the context of the hundreds of telephone calls Mr. Thompson would handle each shift, are insufficient to establish intentional misconduct or a pattern of carelessness or negligence sufficient to indicate a willful disregard of the employer's interest.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Thompson was discharged for no disqualifying reason. Accordingly, Mr. Thompson is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The Agency representative's September 12, 2012, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css