

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROGERIA L FERGUSON
Claimant

APPEAL NO. 18A-UI-10125-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FOCUS SERVICES LLC
Employer

OC: 08/26/18
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Administrative Code Rule 871-24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

Rogeria Ferguson filed a timely appeal from the October 2, 2018, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the deputy's conclusion that Ms. Ferguson was discharged on August 30, 2018, for violation of a known company rule. After due notice was issued, a hearing was held on October 26, 2018. Ms. Ferguson participated. Naomi Strange of Employer Solutions Group represented the employer and presented testimony through Angie Pratt and Kodi McInerney. Exhibits 1 through 5 were received into evidence.

ISSUES:

Whether Ms. Ferguson was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits.

Whether the discharge was based on a "current act."

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Rogeria Ferguson was employed by Focus Services, L.L.C. as a full-time CenturyLink Account Specialist/Agent. Ms. Ferguson handled inbound calls from CenturyLink customers seeking to terminate Internet services. Ms. Ferguson's duties included attempting to dissuade customers from terminating Internet services, resolving billing issues, upselling services including DirecTV, and processing discontinuation requests. Ms. Ferguson began the employment in December 2017 and was discharged from the employment on August 30, 2018, for a "cram/slam" on June 11, 2018.

On June 11, 2018, Ms. Ferguson handled a call from a customer who requested to cancel CenturyLink Internet services. The customer clearly stated and stood by his request to cancel services. Ms. Ferguson did not process the request to discontinue services. Instead, Ms. Ferguson knowingly and intentionally created a change order that not only kept Internet services in place but added services. CenturyLink and Focus Services call such unauthorized addition of services a "cram/slam." Pursuant to CenturyLink work rules, a single incident of "cram/slam" could result in removal from the CenturyLink account. CenturyLink is Focus

Services' only client in the Midwest and dictates work rules for Focus Services employees assigned to CenturyLink work. Ms. Ferguson was aware of the work rules. Ms. Ferguson had been disciplined by Focus Services in February 2018 for similar conduct.

Ms. Ferguson's June 11, 2018 conduct came to the attention of Focus Services management on August 16, 2018, when the customer contacted Focus Services to complain about additional charges to his account and the failure to discontinue services. On August 16, the customer spoke with a management team member at the Focus Services facility in Clinton. Ms. Ferguson worked at the Focus Services facility in Dubuque. The Clinton Focus Services manager referred the matter to CenturyLink, pursuant to guidelines established by CenturyLink for "escalating" such matters. The Clinton Focus Services manager did not alert the Focus Services management in Dubuque. On August 28, 2018, CenturyLink directed Focus Services in Dubuque to remove Ms. Ferguson from the CenturyLink account. Focus Services first spoke to Ms. Ferguson about the matter on August 30, 2018 and discharged her from the employment at that time. Ms. Ferguson had continued to perform work for Focus Services on the CenturyLink account until August 30, 2018.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 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).

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).

The evidence in the record establishes a discharge for no disqualifying reason. The discharge was not based on a “current act” within the meaning of the law. The delay between the June 11 conduct and the employer’s knowledge of the conduct on August 16 is not a problem relative to the determination of whether the discharge was based on a current act. However, the two-week delay from the employer’s knowledge of the conduct to discussion of the matter with Ms. Ferguson was an unreasonable delay. That delay was attributable to a lack of communication between the employer’s Clinton management and Dubuque management. There was nothing to prevent the Clinton manager from contacting the Dubuque management at the same time the matter was reported to CenturyLink. Because the discharge was not based on a current act, there can be no finding of misconduct. Ms. Ferguson is eligible for benefits, provided she is otherwise eligible. The employer’s account may be charged for benefits.

DECISION:

The October 2, 2018, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The discharge was not based on a current act. The claimant is eligible for benefits, provided she is otherwise eligible. The employer’s account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/scn