

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LINDSEY E BOTKIN
Claimant

APPEAL NO. 14A-UI-00572-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**UNITED STATES CELLULAR
CORPORATION**
Employer

OC: 12/08/13
Claimant: Respondent (2-R)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 10, 2014, reference 01, decision that allowed benefits to the claimant provided the claimant was otherwise eligible and that held the employer's account could be charged for benefits. After due notice was issued, a hearing was held on February 7, 2014. Claimant Lindsey Botkin participated. Lyndsy Holloway, Retail Area Sales Manager, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibit One into evidence.

The fact-finding materials were not available at the time of the appeal hearing and, for that reason, the administrative law judge was unable to adjudicate whether the employer participated in the fact-finding interview within the meaning of the law.

ISSUES:

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

Whether the claimant was overpaid benefits.

Whether the claimant must repay benefits.

Whether the employer's account may be charged for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Lyndsy Botkin was employed by United States Cellular Corporation as retail store manager until December 12, 2013, when Lyndsy Holloway, Retail Area Sales Manager, discharged him for violating established company policies. Mr. Botkin had started with the employer in October 2012. Mr. Botkin held the store manager position during the final six months of the

employment. Prior to holding the store manager position, Mr. Botkin had been sales manager at the same store.

On December 12, 2013, Ms. Holloway interviewed Mr. Botkin with regard to repeated violations of two company policies. The first set of violations concerned Mr. Botkin's handling of a former employee's account. At the time the employee left the employment in September 2013, Mr. Botkin converted the employee's two phone lines to personal lines and added a third line at the employee's request. Mr. Botkin waived the \$35.00 activation fee for each line even though the employer did not at that time have an activation fee waiver promotion. In addition, Mr. Botkin provided the departing employee with a substantial, unauthorized discount on a cell phone. The employer's cost for the phone was \$700.00. The amount the employer charged contract customers for the particular phone was \$200.00. Mr. Botkin sold the phone to the departing employee for \$.01. From September 2013 through December 2013, Mr. Botkin entered multiple unauthorized credits to the former employee's account so that the employee paid nothing for employer's service during that period. In fact, the credits Mr. Botkin entered on the account indicated that U.S. Cellular owed the former employee money for use of the U.S. Cellular service. The employer's established policies prohibited employees from transacting business on friends' accounts. Mr. Botkin was aware of the policy and was responsible for enforcing the policy at his store.

In addition, Mr. Botkin had on multiple occasions accessed his own U.S. Cellular account to make payments on the account. The employer's established policies prohibited employees from using their employee access privileges to access their personal U.S. Cellular account. Mr. Botkin was aware of the policy and was responsible for enforcing the policy at his store.

Mr. Botkin established a claim for benefits that was effective December 8, 2013 and received \$3,641.00 in benefits for the period of December 8, 2013 through February 8, 2014.

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 repeated and ongoing intentional violation of the employer's policies. As retail store manager, Mr. Botkin was in a position requiring both trustworthiness and integrity. Mr. Botkin violated the employer's trust by engaging in a pattern of conduct that was clearly against the employer's interest. While Mr. Botkin asserts his action on the departing employee's account was motivated by a desire to keep a customer, there is no evidence that the employer was at risk of losing the departing employee's business. There was, therefore, no need to provide the employee with discounts. In any event, Mr. Botkin provided unauthorized, substantial discounts to the former employee at the time the personal account was set up and thereafter provided multiple unauthorized, substantial credits. The loss to the employer was at least several hundred dollars. From September through the discharge date in December 2013, Mr. Botkin was fully aware that he was providing the former employee with unauthorized discounts and credits. He was also fully aware that the conduct was contrary to the employer's interests. Mr. Botkin's action on the former employee's account indicates more than a mere coworker relationship. In other words, the weight of the evidence indicates that Mr. Botkin and the former employee were indeed in a friend relationship that Mr. Botkin was obligated to disclose to the employer and that obligated Mr. Botkin to refrain from transacting business on the account. Mr. Botkin's unauthorized employee access to his personal account also constituted misconduct in connection with the employment. Each time Mr. Botkin made that unauthorized access he was fully aware that he was violating established policy designed to prevent theft from the employer.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Botkin was discharged for misconduct. Accordingly, Mr. Botkin is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Botkin on or after the entry date of this decision.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid \$3,641.00 in benefits for the period of December 8, 2013 through February 8, 2014. The matter of deciding whether the amount overpaid should be recovered from the claimant and charged to the employer under Iowa Code section 96.3-7-b is remanded to the Benefits Bureau.

DECISION:

The Agency representative's January 10, 2014, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged for benefits paid to the claimant on or after the entry date of this decision. The claimant is overpaid \$3,641.00 in benefits for the period of December 8, 2013 through February 8, 2014. This matter is remanded to the Benefits Bureau for adjudication of the employer's participation in the fact-finding interview and related adjudication of whether the claimant is required to repay the overpaid benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css