

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

FELDMAN, JASON, L
Claimant

APPEAL NO. 11A-UI-05269-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

QWEST CORPORATION
Employer

OC: 03/20/11
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Jason Feldman filed a timely appeal from the April 14, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 16, 2011. Mr. Feldman participated. John O’Fallon of Barnett Associates represented the employer and presented testimony through Lindsey Link.

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: Jason Feldman was employed by Qwest Corporation as a full-time consumer sales and service associate from September 2010 until March 25, 2011, when the employer discharged him for adding unauthorized charges to customer accounts to inflate his sales and commissions. The practice is known as “cramming.” The final such incident came to the employer’s attention on March 18, 2011, when the affected customer contacted Qwest to complain at the unauthorized charges to their account. The customer had contacted Qwest to order internet services. Mr. Feldman violated the employer’s policy by failing to disclose the cost of the service. Mr. Feldman violated the employer’s policy by adding a \$99.00 modem to the transaction without asking the customer whether they needed a modem and without disclosing the charge. Mr. Feldman also added a \$69.00 tech install without asking the customer whether they needed help installing the product and without disclosing the charge. Mr. Feldman was aware that he was violating the employer’s policies and acting contrary to the customer’s interests at the time he engaged in the conduct. The final incident of cramming followed prior similar conduct on January 5, 2011 that led to a reprimand on February 4, 2011.

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 establishes that Mr. Feldman knowingly and intentionally violated the employer's prohibition against cramming products and services on January 5, 2011 and again in March 2011. Mr. Feldman knowingly and intentionally took action that was detrimental to the customers involved. The conduct was in willful and wanton violation of the employer's interests in maintaining customers and good faith relations with those customers.

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

DECISION:

The Agency representative's April 14, 2011, reference 01, decision is affirmed. 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css