

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RANDY S BENNETT
Claimant

APPEAL NO. 09A-UI-09350-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SEARS ROEBUCK & CO
Employer

OC: 05/24/09
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 19, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 31, 2009. Claimant Randy Bennett participated. Bridget Clark, Human Resources Manager, represented the employer and presented additional testimony through Louis McCaslin, Team Manager, and Fred Hoffman, Sales and Service Manager. Exhibits One through Six 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: Randy Bennett was employed by Sears as a full-time call agent from February 2005 until May 22, 2009, when Louis McCaslin, Team Manager, discharged him from the employment. Mr. McCaslin was Mr. Bennett's immediate supervisor. Mr. Bennett's duties involved receiving calls routed by the employer's national call center. Mr. Bennett would sell water heaters and other goods and services by telephone.

The final incident that prompted the discharge occurred on May 22, 2009, at a time when Mr. McCaslin was monitoring Mr. Bennett's phone calls. On one call, Mr. Bennett gave the standard greeting, did not hear anyone on the other end and terminated the call. Mr. McCaslin concluded that Mr. Bennett had prematurely terminated the call. Within 30 seconds, Mr. Bennett had taken another customer call routed to him by the employer's call cuing system. A short while later, Mr. McCaslin asked Mr. Bennett whether he was experiencing problems with his phone system and Mr. Bennett indicated he was not. Mr. Bennett was only at work approximately half an hour on May 22 prior to being discharged from the employment. During that short period, Mr. Bennett handled seven to 12 customer calls.

In making the decision to discharge Mr. Bennett from the employment, the employer considered a reprimand issued to Mr. Bennett in May 2007 for avoiding calls by prematurely terminating them.

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 fails to establish willful misconduct in connection with the final incident that triggered the discharge. The weight of the evidence indicates that Mr. Bennett, for whatever reason, did not hear the caller on the other end and terminated the call for that reason. Immediately thereafter, Mr. Bennett took another incoming call. The weight of the evidence fails to establish "call avoidance." That reprimand the employer issued two years prior, at a time when several of its employees were engaging in call avoidance, does not prove two years later that Mr. Bennett was engaging in such behavior on May 22, 2009.

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

DECISION:

The Agency representative's June 19, 2009, 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