

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WILLIAM J FLANDERS
Claimant

APPEAL NO. 15A-UI-03187-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SABRE COMMUNICATIONS CORP
Employer

OC: 02/22/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

William Flanders filed a timely appeal from the March 11, 2015, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that Mr. Flanders had been discharged on February 25, 2015 for misconduct in connection with the employment. After due notice was issued, a hearing was held on June 3, 2015. Mr. Flanders participated. Erin Baird represented the employer.

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: William Flanders was employed by Sabre Communications Corporation as a full-time quality control lead until December 25, 2015, when Paula Peterson, Human Resources Director, discharged him from the employment for allegedly intentionally bypassing the employer's computer network security system by attaching a personal electronic device to access the Internet on February 19, 2015. Mr. Flanders denied the allegation at time the employer's information technology staff investigated the matter, at the time the employer discharged him from the employment, and at the appeal hearing. Mr. Flanders concedes that earlier in the shift on February 19, 2015, he attempted to download and print a Harley Davidson manual, had difficulty doing so, and reported the difficulty to his supervisor. The employer's I.T. department opened a service ticket to address the matter and did so at the request of Mr. Flanders' supervisor.

The next most recent incident that factored in the discharge occurred at the beginning of February, when Mr. Flanders manipulated his time report to make it look like he had worked later than he had actually worked.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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). 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 employer failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to prove a current act of misconduct by a preponderance of the evidence. The employer alleges that Mr. Flanders used a personal electronic device to bypass the employer's computer network security system to gain unauthorized access to the Internet. Mr. Flanders denies the allegation. There was surveillance of the alleged conduct, but the employer did not provide the surveillance record as evidence. The employer's I.T. department investigated the matter and provided the information that triggered the discharge, but the employer did not have anyone from its I.T. department provide testimony at the hearing. Ms. Peterson interviewed Mr. Flanders about the matter, but the employer elected not to present testimony from Ms. Peterson. The employer's sole witness' personal knowledge of the matter was limited to her review of the surveillance record. Given that was the witness' only personal knowledge of the matter, the administrative law judge cannot judge that testimony to be more credible than the claimant's denials in the absence of the surveillance record. The employer had the ability to present more direct and satisfactory evidence than was presented, but elected not to present such evidence. Because the evidence fails to establish misconduct in connection with the final incident that triggered the discharge, and because the next most recent incident that factored occurred at the beginning of February 2015, the evidence fails to establish a current act of misconduct upon which a disqualification might be based. Because the employer did not prove a current act of misconduct, the administrative law judge need not further consider the earlier conduct.

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

DECISION:

The March 11, 2015, reference 01, decision is reversed. 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

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