

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**STEVEN W NICKELL**  
Claimant

**APPEAL NO. 11A-UI-03965-JT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CDS GLOBAL INC**  
Employer

**OC: 02/20/11  
Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Steven Nickell filed a timely appeal from the March 21, 2011, reference 02, decision that denied benefits. After due notice was issued, an in-person hearing was held on May 13, 2011. Mr. Nickell participated. Employee Relations Specialist Linda Burns represented the employer and presented additional testimony through Customer Service Manager Kelly Cool, Senior Manager in Customer Service Shannon Parrish, and Employee Relations Manager John Noll. Exhibits One through Eight 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: Steven Nickell was a full-time employee of CDS Global, Inc., from 2000 until February 15, 2011, when Customer Service Manager Kelly Cool, Senior Manager in Customer Service Shannon Parrish, Employee Relations Manager John Noll, and Employee Relations Specialist Linda Burns discharged him from the employment. Mr. Nickell had been a Customer Service Manager from the time of hire until 2004 when his position was eliminated in connection with a restructuring. Mr. Nickell accepted a Customer Service Representative position and continued in that position until he was discharged from the employment. Ms. Cool was Mr. Nickell's immediate supervisor during the last three years of the employment.

The employer contracts with magazine companies to provide customer services to subscribers. When Mr. Nickell interacted with subscribers, the subscriber would have no way of knowing that Mr. Nickell was an employee of an agency contracting with the magazine rather than an employee of the magazine itself.

The final incident that triggered the discharge concerned Mr. Nickell's handling of a February 10, 2011 telephone call from a Library of America subscriber. Mr. Nickell had been taking calls for Library of America for two years. Mr. Nickell had received appropriate training.

Ms. Nickell had ready access to additional guidance concerning Library of America account matters via computer help screens specific to the account and through his supervisor. On February 10, 2011, Mr. Nickell took a call from a Library of America subscriber who had received a damaged book. In addition to receiving a damaged book, the subscriber had received a book he did not want. Pursuant to Library of America protocol for such situations, Mr. Nickell was supposed to advise the customer that the customer could keep, donate, or discard the damaged book and to advise the subscriber that he would send to the customer the book that the customer wanted instead. Despite his training and experience, Mr. Nickell did not listen fully to the customer to learn what the full issue was before he started taking action on the account through his computer. As soon as Mr. Nickell heard the customer say the book was damaged, he made a computer entry that generated a new mailing of the same book to the customer. When the customer explained that he did not want the book he received, Mr. Nickell told the customer that when the customer received the second, undamaged copy of the unwanted text, the customer would then have to reject the second copy before the customer could get a different text. One listening to the recorded call can readily sense the subscriber's frustration and bewilderment with Mr. Nickell's explanation of the unnecessary hoops the subscriber would have to jump through before the customer could get the matter resolved. One listening to the call can readily detect the subscriber's ultimate acquiescence in the absurd resolution imposed by Mr. Nickell. Mr. Nickell knew how to handle the matter appropriately and elected not to do so to save himself the effort of correcting his error. Mr. Nickell's decision not to correct his error imposed an additional burden on the subscriber and left the subscriber with a negative impression of Library of America's customer service.

On February 11, 2011, a couple of CDS Global staff were reviewing a random sample of calls with a Library of America representative and heard the call Mr. Nickell handled regarding the damaged book. The Library of America representative was displeased with Mr. Nickell's handling of the call. The CDS Global staff was able to readily correct the errors Mr. Nickell had made and relieve the subscriber of the additional burden imposed by Mr. Nickell.

The final incident that triggered the discharge followed a reprimand Ms. Cool had issued to Mr. Nickell on January 7, 2011. That reprimand was based not only on Mr. Nickell's flat affect while providing customer service, but also on the fact that he fell asleep during four separate phone calls and only awoke after the subscriber woke him up. When the employer decided to only reprimand Mr. Nickell and allow him to continue in the employment, Mr. Nickell expressed his relief and acknowledged that when he had been a manager, he had fired customer service representatives for less egregious conduct. The January 2011 reprimand followed several prior concerns regarding Mr. Nickell's flat affect, lack of empathy, and rudeness during earlier calls.

Mr. Nickell demonstrated he had the ability to perform his assigned duties in a satisfactory manner.

#### **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 in the record suggests that Mr. Nickell made an intentional decision on January 10, 2011 to provide the subscriber with substandard customer service and to impose an additional unnecessary burden on the subscriber. That decision did reflect a willful disregard of the employer's interests and the client business's interests. Even if the administrative law judge were to conclude that the January 10, 2011 conduct only amounted to negligence, that conduct, coupled with Mr. Nickell's slumber during the four calls in January,

establishes a pattern of negligence indicative of a willful disregard of the employer's interests. The weight of the evidence establishes that Mr. Nickell was indeed discharged for misconduct. Accordingly, Mr. Nickell 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. Nickell.

**DECISION:**

The Agency representative's March 21, 2011, reference 02, 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/pjs