

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANTOINETTE GUERRA

Claimant

APPEAL NO. 07A-UI-03398-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

QWEST CORPORATION

Employer

**OC: 03/11/07 R: 01
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Antoinette Guerra (claimant) appealed a representative's March 29, 2007 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Qwest Corporation (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 19, 2007. The claimant participated in the hearing and presented testimony from one other witness, Dave Powell. Dave Wood of Barnett Associates, Inc. appeared on the employer's behalf and presented testimony from two witnesses, Matt Tower and Trine Wingert. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on April 25, 2005. She worked full time as a center sales and service associate in the employer's Sioux City, Iowa center. Her last day of work was March 13, 2007. The employer discharged her on that date. The reason asserted for the discharge was violation of the employer's code of conduct and business ethics relating to proper treatment of customers.

The claimant had received several warnings regarding the need to pay attention and focus on the call, including a policy review on December 13, 2006 and a warning of dismissal on February 20, 2007; those warnings coincided with questions about the claimant reading or sending email while on calls.

On March 6 the employer's quality assurance department forwarded a concern to the claimant's supervisor, Ms. Wingert, about a call the claimant had taken March 5. A customer had called in with a problem and the claimant took the call. Early in the call she repeated the standard required welcome statement, and after the customer described his problem, which was that his phone service had not been transferred to his new address by the date he had anticipated, the claimant asked him twice to repeat at least a portion of his explanation. She did this because the customer had a strong accent and she had difficulty understanding him. Once she understood what his situation, since it

was not a programming or product issue, she transferred the call to the employer's repair department.

After transferring the call, the claimant failed to disengage her end of the call, leaving her phone in active status for the approximate 12 minutes the customer was on the phone speaking to a repair representative, even though the claimant did not stay on the call herself. The claimant concedes that she likely failed to disengage the call when she was done because she went to break at that time. There was no direct evidence presented and the claimant denied that during the call she was otherwise distracted by any other activities.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The focus of the definition of misconduct is on acts or omissions by a claimant that “rise to the level of being deliberate, intentional or culpable.” Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is the employer's belief that she had not been paying attention to the call. Under the circumstances of this case, the claimant's failure to understand the customer due to the customer's accent, leading to her repetition, and her leaving the call engaged after the transfer to go on break was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, and was a good-faith error in judgment or discretion, as compared to intentional, substantial, or repeated misbehavior. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984); Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's March 29, 2007 decision (reference 01) is reversed. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw