

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

ANDY J VILKS
c/o D L VILKS
3023 KINGMAN BLVD APT 4
DES MOINES IA 50311

QWEST CORPORATION
c/o EMPLOYERS UNITY INC
PO BOX 749000
ARVADA CO 80006-9000

Appeal Number: 04A-UI-01988-B4T
OC: 10-12-03 R: 02
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.6-2 – Timeliness of Appeal
Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Andy J. Vilks, sometimes known as Andris J. Vilks, appealed from an unemployment insurance decision dated November 14, 2003, reference 02, that held, in effect, the claimant was discharged from his employment with Qwest Corporation on October 14, 2003 for excessive unexcused absenteeism and tardiness. Unemployment insurance benefits were denied.

A consolidated telephone conference hearing was scheduled and held on March 11, 2004, pursuant to due notice. Andy J. Vilks participated. Leslie Bohler, Human Resources Representative for Employer's Unity, Inc., represented the employer during the hearing. Joan

Boley, Clinical Case Manager, and Curtis Zellmer, Supervisor, participated on behalf of the employer as witnesses.

Official notice was taken of the unemployment insurance decision dated November 14, 2003, reference 02, together with the pages attached thereto (7 pages in all). Claimant's Exhibit A was admitted into evidence.

FINDINGS OF FACT:

The administrative law judge, having examined the entire record in this matter, finds that:

Timeliness of Appeal Issue:

Andy J. Vilks filed an initial claim for benefits having an effective date of October 12, 2003. Subsequently, a fact-finding interview was held and a decision of the representative was dated and mailed to the parties of record on November 14, 2003. The said decision contained a caveat requiring the claimant to file an appeal by November 24, 2003. Exhibit A admitted into evidence discloses that the claimant's letter of appeal was directed to Iowa Workforce Development in Des Moines, Iowa, on February 23, 2004 by the claimant.

The testimony of the claimant is believable in that he did not receive a copy of the decision under consideration until he contacted a local Workforce Development office following the due date of the appeal. At that time, the claimant then filed his letter of appeal and established that he had changed his address from that shown on the records to the address shown on his notice of hearing in this matter.

The administrative law judge concludes that the record establishes the claimant was denied the opportunity of filing a timely appeal because he did not receive the decision in a timely fashion. The administrative law judge concludes that a timely appeal has been filed from the decision under consideration and the Workforce Development Department has jurisdiction of the parties hereto and of the subject matter hereof necessary to enter upon a determination relating to the nature of the claimant's termination of employment.

Termination of Employment Issue:

Andy J. Vilks was employed with Qwest Corporation from on or about January 1, 1999 through October 14, 2003. During the tenure of the claimant's employment, he was not provided with a copy of the rules and regulations adopted by the employer relating to the disciplinary policy or absenteeism and tardiness. In addition, the record does not establish that the claimant was ever warned that his job was in jeopardy either verbally or in writing for violation of employer rules.

Employer witnesses were unable to establish by explicit and direct evidence that the claimant was absent on any given date on a no-call/no-show basis or without justifiable reason. The employer did not file records of any kind which would establish excessive unexcused absenteeism and tardiness.

The record does establish that the claimant was absent on numerous occasions throughout his employment due to illness and hospitalization. In addition, the claimant provided statements from a licensed and practicing physician to the employer which were not provided for purposes of the hearing held in this matter by the employer.

On October 14, 2003, a letter was left at the claimant's former address by Curtis Zellmer, Supervisor. The letter is shown by page 5 attached to the decision under consideration.

On October 15, 2003, the claimant was provided with a copy of the letter shown by page 6 attached to the decision under consideration indicating that Qwest Corporation had terminated his employment effective October 14, 2003.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.6-2 provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The evidence in the record establishes that the claimant was not provided with a copy of the decision under consideration in a timely fashion which would have enabled him to file a timely appeal. The claimant's address was changed and he did not receive the decision that was mailed to him.

Subsequently, the claimant did obtain a copy of the decision under consideration and filed an appeal as shown by Exhibit A admitted into evidence.

The administrative law judge concludes that a timely appeal was filed on behalf of the claimant and the Workforce Development Department has jurisdiction of the parties hereto and of the subject matter hereof necessary to enter upon a determination relating to the nature of the claimant's termination of employment.

Termination of Employment Issue:

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The employer has totally failed to provide explicit and direct evidence relating to alleged incidents of absenteeism and tardiness on an unexcused basis by the claimant. The claimant was absent on numerous occasions caused by illness and hospitalization. The claimant provided to the employer documentation from licensed and practicing physicians regarding his absenteeism, none of which was provided by the employer for purposes of the hearing held in this matter.

The employer has failed to establish that the claimant intentionally and substantially disregarded the employer's interests by failing to report for work when scheduled. The employer has failed to provide documentation which would establish the claimant committed a deliberate act or a series of deliberate acts or omissions which would constitute misconduct.

Excessive unexcused absenteeism and tardiness has not been established within the meaning of the foregoing section of the Iowa Administrative Code.

The administrative law judge concludes that Andy J. Vilks, also sometimes known as Andris J. Vilks, was discharged from his employment with Qwest Corporation on or about October 14, 2003 for no disqualifiable reason within the intent and meaning of the foregoing sections of the Iowa Code and Iowa Administrative Code.

DECISION:

The unemployment insurance decision dated November 14, 2003, reference 02, is reversed. Andy J. Vilks, also known as Andris J. Vilks, was discharged from his employment with Qwest Corporation on October 14, 2003 for no disqualifiable reason, and unemployment insurance benefits are allowed, provided the claimant is otherwise eligible under the provisions of the Iowa Employment Security Law. A timely appeal was also filed on behalf of the claimant which provided jurisdiction of the parties to enter upon a determination relating to the nature of the claimant's termination of employment.

tjc/b