

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

BRIAN DOWNARD
5656 SE CIRCLE DR
CARLISLE IA 50047

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

Appeal Number: 05A-UI-05309-DT
OC: 04/17/05 R: 02
Claimant: Respondent (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 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Qwest Corporation (employer) appealed a representative's May 9, 2005 decision (reference 01) that concluded Brian Downard (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last known addresses of record, a telephone hearing was held on June 8, 2005. The claimant participated in the hearing and was represented union representative Mark Rocha, who also appeared as a witness. Mara Benjamin of Employer's Unity appeared on the employer's behalf and presented testimony from two witnesses, Dean Reed and Jason Douglas. During the hearing, Employer's Exhibits One through Five were entered into evidence; the record was left open through June 10, 2005 for submission and admission of Employer's Exhibit Six. 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 1, 2002. He worked full time as a service and sales consultant at the employer's Des Moines, Iowa call center. His last day of work was April 12, 2005. The employer suspended him that day and discharged him on April 21, 2005. The stated reason for the discharge was the quality of his calls.

The claimant had been receiving warnings regarding his failure to meet performance standards, both with regard to gross revenue per call and with regard to customer satisfaction ("customer delight"). On February 8, 2005, he was given a "Repeat Warning of Dismissal" because his performance on "customer delight" had not met expectations. The warning provided that "if you fail to meet this expectation or if you fall below standards in any other area of performance, you could face further disciplinary actions, up to and including dismissal."

On February 12, 2005, the claimant was verbally counseled with regard to his handling of a specific call. During the call, the customer had requested to speak to a supervisor, but the claimant had exaggerated and indicated that a supervisor might not be available for at least a half-hour to an hour. Mr. Douglas, the claimant's customer relations manager, instructed the claimant that if a customer asks to speak with a supervisor, he was to inform the customer that he would try to find a manager but it might take a few minutes.

On April 11, 2005, the claimant received a call from a customer who was having problems getting a modem from the employer for his DSL service. The customer had a strong accent, and was already somewhat frustrated because he had called in previously and spoken to some other representative and had gotten incorrect information. During the call, the customer became increasingly frustrated with the claimant's apparent lack of understanding of the situation, and so he began to ask to speak to a supervisor. The claimant did not outright refuse to transfer the customer, but repeatedly asked the customer the reason he wished to speak to a supervisor. The customer became even more frustrated with the claimant's asking what the problem was that the customer wished to speak to the supervisor about, as it was apparent that at least part of what the customer wished to speak to the supervisor about was the claimant's failure to understand the customer's situation. While it is true that the customer's aggravation was in part due to his failure to understand that he had previously been given incorrect information, the claimant also had failed to successfully communicate the correct information to the customer, and also failed to realize that he had not successfully communicated, so that a supervisor's intervention was both necessary and appropriate. Finally, after the customer again asked to speak to a supervisor and the claimant again asked the customer the issue he wished to speak about with a supervisor, the customer became disgusted and said, "Why are you so stupid?" The claimant then said, "Thank you for calling Qwest," and put the phone on mute. The customer, clearly thinking the claimant had hung up on him, then hung up.

The claimant established a claim for unemployment insurance benefits effective April 17, 2005. The claimant has received unemployment insurance benefits after the separation from employment in the amount of \$2,672.00.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct. The issue is not whether the employer was right or even had any other choice but 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 decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). 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); Iowa Code §96.5-2-a.

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).

The claimant's poor treatment of the customer on April 11, 2005, particularly when he knew his job was in jeopardy for issues including customer satisfaction and was on notice that he was not

to impede a customer's wish to speak to a supervisor, shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's May 9, 2005 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of April 17, 2005. This disqualification continues until the claimant has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged. The claimant is overpaid benefits in the amount of \$2,672.00.

ld/kjw