IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

NICHOLAS LENTERS Claimant **C WENGER GROUP INC** Employer	**APPEAL 20A-UI-13116-SN-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/05/20** **Claimant: Appellant (1)**

Iowa Code § 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 12, 2020, (reference 01) unemployment insurance decision that denied benefits based upon the conclusion he was discharged for conduct not in the best interest of the employer. The parties were properly notified about the hearing. A telephone hearing was held on December 18, 2020. Claimant participated and testified. The employer participated through President and CEO Tom Vander Well. Exhibits One through Four were admitted into the record.

ISSUE:

Was the separation a layoff, discharge for misconduct or voluntary quit without good cause attributable to the employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a senior data analyst from January 2008 until he was separated from employment on June 30, 2020, when he was discharged.

The employer pays its employees through commissions. An individual employee's working hours and pay fluctuate wildly with client demand.. The employer provided a spreadsheet showing the claimant's commissions from January 1, 2020 to June 20, 2020 with a total pay of $35,000.00. (Exhibit 3) The claimant's immediate supervisor was Mr. Vander Well. The claimant was the employer's third highest performer prior to his separation. In his role, he was responsible for traveling to perform coaching for clients, completing various reports and scoring call recordings. (Exhibit 1) The employer did not conduct regular performance reviews of the claimant. In fact, the last performance review the claimant had was conducted five or six years prior to his termination.

On December 9, 2019, Mr. Vander Well requested claimant meet him for lunch because of a report he had made for a brand new client. Mr. Vander Well was concerned because claimant did not appear to have given his time and attention. The errors in this report were similar to some isolated times in the past when the claimant temporarily lacked sufficient attention to

detail. During this same conversation, the claimant told Mr. Vander Well about his plans to start his own meat locker in Waukee during the first week of May 2020. In this context, Mr. Vander Well suspected the claimant would not want to perform some of the duties of his position such as traveling around the country to perform coaching and scoring call recordings.

Shortly after the December 9, 2019 conversation, Mr. Vander Well expressed his concerns regarding the claimant's business plans to the board of directors. This became a subject of discussion over the next several months in anticipation of it opening the first week in May 2020. In early discussions, Board Member Scott Weir and Mr. Vander Well floated the idea of the claimant taking a subdued role with the company.

The claimant agreed to travel in the first quarter of 2020. The claimant became more reluctant at the prospect of traveling in the second quarter of 2020. However, the Covid19 pandemic assured the claimant would not be traveling during that period of time.

On April 24, 2020, the employer's board of directors decided to terminate the claimant due to concerns regarding his future performance given his plans for a new business.

On May 28, 2020, Mr. Vander Well called the claimant and informed of the employer's intention to end his full time employment on June 30, 2020. After the phone call, Mr. Vander Well sent an email outlining his proposal for the claimant's severance and the transition plan for his successor. (Exhibit 4)

On May 31, 2020, the claimant sent an email to the employer's board of directors stating he was surprised by his termination announcement on May 28, 2020. In the remainder of the email, the claimant negotiated terms of his severance package and agreed to train his successor. (Exhibit 4)

On June 1, 2020, the claimant met with the employer's board of directors negotiated his severance agreement. After that meeting, Mr. Vander Well wrote up a memo on regarding claimant's severance agreement. (Exhibit 1)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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).

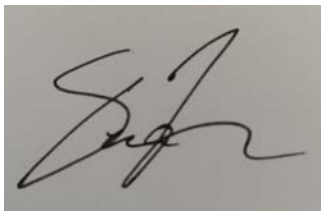
The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

The employer contends the claimant's performance was slipping and his attention was waning. However, Mr. Vander Well conceded the claimant had similar isolated errors on reports in the past. Since the employer agreed that claimant had similar errors at isolated periods in the past and the claimant attempted to perform the job to the best of his ability but was unable at times to meet its expectations, no intentional misconduct has been established, as is the employer's burden of proof. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The employer's own actions show it did not terminate the claimant because it believed he was intentionally performing poorly. It agreed to have him work for it for several more months and to train his successor. To the extent the employer's decision was based on the claimant's performance, it was based on his anticipated performance when his business opened in May 2020. A finding of willful misconduct cannot be based on anticipation of future poor performance. Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

DECISION:

The October 12, 2020, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.



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Sean M. Nelson
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January 25, 2021
Decision Dated and Mailed

smn/scn