

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DOUGLAS OLSEN

Claimant

APPEAL NO. 12A-UI-14086-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

QWEST CORPORATION

Employer

OC: 10/28/12

Claimant: Respondent (2R)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Employer filed a timely appeal from a representative's decision dated November 20, 2012, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on January 23, 2013. Claimant participated. The employer participated by Ms. Maxiene Piper, Hearing Representative and witness, Ryan Fritchen, Supervisor. Employer's Exhibits A, B and C were received into evidence.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct in connection with his work.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Douglas Olsen was employed by the captioned employer from June 22, 2009 until October 30, 2012 when he was discharged from employment. Mr. Olsen held the position of full-time sales/service associate in the company's call center and was paid by the hour. His immediate supervisor was Ryan Fritchen.

Mr. Olsen was discharged because of his failure to attend mandatory overtime after being warned.

Under established company policies employees are required to attend mandatory overtime when scheduled by the employer. Mr. Olsen was aware of the requirement and had been warned by the employer of the necessity that he attend the mandatory overtime. When Mr. Olsen continued to miss mandatory overtime he received a final warning from the company on October 24, 2012. After receiving a final warning, Mr. Olsen again missed mandatory overtime on October 29 and October 30 resulting in his termination from employment.

Mr. Olsen was unable to attend mandatory overtime on a number of occasions due to domestic issues. On one occasion the claimant had a plumbing issue at home and needed to be at his

residence. On other instances, however, the claimant was unable to attend early morning mandatory overtime because it was necessary for him to drop his five-year-old child off at school and the claimant did not have sufficient time to report for work for the overtime that was scheduled. It appears that Mr. Olsen and his wife had determined that Mr. Olsen would be the individual who missed work, if it was required for childcare reasons because the claimant's wife had a better paying position.

It is Mr. Olsen's contention that he should not have been discharged as another supervisor had suggested a reasonable alternative in the form of childcare that the claimant had not previously considered and that although that suggestion had been made by the other supervisor on October 30, 2012 the employer nonetheless made a decision to terminate Mr. Olsen based upon his most recent attendance infractions after being warned.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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 insurance benefits.

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).

In this matter the evidence in the record establishes that Mr. Olsen was aware of the company's mandatory overtime rule and was aware that failure to report for mandatory overtime could jeopardize his employment and ultimately lead to discharge from employment. The claimant and his wife, it appears, made a conscious decision that Mr. Olsen would miss work if necessary to provide transportation to his five-year-old child to school instead of his wife because his wife had a better paying job and the couple did not wish to jeopardize her employment.

Although Mr. Olsen had been warned by the company and had received a final warning on October 24, 2012, the claimant had not taken any independent action to provide other childcare arrangements that would allow him to attend mandatory overtime when it was scheduled. Based upon the last warning that was served upon the claimant Mr. Olsen knew that his employment was in jeopardy and he was discharged when he failed to attend mandatory overtime on October 29 and October 30, 2012.

Although the administrative law judge is sympathetic to Mr. Olsen's situation, there is no contract more basic in employment than the right of the employer to expect employees will appear for work on the hour and day required and recurrent failure to honor that obligation evinces a substantial disregard for the employer's interests and thus may justify a finding of misconduct in connection with the work.

Based upon the evidence in the record the administrative law judge concludes that the claimant's repeated failure to attend mandatory overtime after being warned constitutes misconduct in connection with the work. The employer has thus met its burden of proof to establish disqualifying conduct on the part of the claimant. Unemployment insurance benefits are withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

DECISION:

The representative's decision dated November 20, 2012, reference 01, is reversed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to the UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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