

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STEVEN OERTWIG

Claimant

APPEAL NO: 10A-UI-15334-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

QWEST CORPORATION

Employer

OC: 10-10-10

Claimant: Respondent (2R)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 29, 2010, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on January 31, 2011. The claimant provided a phone number prior to the hearing but was not available at that number at the time of the hearing and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Laura Griffith, Telesales Manager; Pamela Pope, Lead Corporate Investigator; and Larry Lampel, Employer Representative, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time consumer sales and service associate for Qwest from November 12, 2007 to October 8, 2010. At the time of hire the claimant indicated on his application for employment he had not been convicted of a felony in the last three years and had not ever been convicted of a felony or misdemeanor other than a traffic ticket. The claimant also stated that the information was truthful and complete. The employer had a contract with a company to perform background checks at the time the claimant was hired but that company missed the claimant's felony assault conviction in 2000 and felony assault causing serious bodily injury conviction in 2007. The claimant did not report a 2008 conviction for felony assault causing serious bodily injury to the employer during his employment as required by the employer's code of conduct. The company that did the background checks missed other items on other employees and its contract with the employer was terminated as a result when the employer learned of its errors. On September 29, 2010, the claimant was arrested at work by the Des Moines Police which caused the employer to begin an investigation and to pull his employment application. The claimant was suspended while the employer continued its investigation and his employment was terminated October 8, 2010, for falsifying his application.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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 proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Generally an employer is required to discover any falsification of an employee's application at the time of hire or shortly thereafter for it to be considered a current act of misconduct. In this case, however, the employer did perform due diligence by hiring a third party to conduct its background checks at the time of hire and ended its association with that company when it learned it was not performing its job satisfactorily. When the claimant was arrested at work it triggered an investigation into his background by the employer at which time it discovered he falsified his employment application by failing to admit to felony convictions in his past and violated the employer's code of conduct by failing to report new charges in 2008 and 2010. Because the employer acted on the information at the time it received it the claimant's actions were a current act of misconduct. Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an

intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The October 29, 2010, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

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