

**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**

**DEAN HERMSEN
1911 E CRESTON AVE
DES MOINES IA 50320**

**QWEST CORPORATION
c/o EMPLOYER'S UNITY INC
PO BOX 749000
ARVADA CO 80006-9000**

**ATTORNEY MICHAEL SELLERS
ONE CORPORATE PLACE
1501 – 42ND ST STE 380
WEST DES MOINES IA 50266-1005**

**Appeal Number: 05A-UI-08309-B
OC: 07/17/05 R: 02
Claimant: Appellant (1)**

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 for Misconduct

STATEMENT OF THE CASE:

Dean Hermesen (claimant) appealed an unemployment insurance decision dated August 8, 2005, reference 01, which held that he was not eligible for unemployment insurance benefits because he was discharged from Qwest Corporation (employer) for work-connected misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a hearing was held in Des Moines, Iowa on September 1, 2005. The claimant participated in the hearing with Laurie Soroka, CWA Union Steward. The employer participated through Jamie McCallister, TeleSales Manager II, and Attorney Michael Sellers. Employer's Exhibits One and Two were admitted evidence.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was employed as a full-time sales/service consultant from June 24, 2002 through July 20, 2005, when he was discharged for violating the employer's conflict of interest policy. The employer's conflict of interest policy is a seven page policy but its meaning is simple; employees are required to avoid financial or other outside relationships that might be adverse to the interests of the employer. Employees must not compete with Qwest, must not allow their dealings on behalf of Qwest to be influenced, and must avoid the appearance of the same. Employees are not required to obtain authorization before working for other employers, however, they are encouraged at one time each year to present any potential conflicts so that there will be no question as to whether their actions are in violation of this policy. Violation of the conflict of interest policy can result in immediate termination and the claimant was aware of the policy and the result of violating that policy.

In March 2005, it was discovered the claimant was acting in violation of the employer's conflict of interest policy since he was working as an independent marketing director for Team National, a company who sells telecommunications services, among other services and products. The employer met with the claimant on March 24, 2005, and the claimant could have been discharged at that time but was not. Instead, he was given the option of resigning from Qwest or continuing his employment with Qwest provided he "cease and desist all business with Team National." The claimant always maintained that he was not in conflict of interest as a result of his connection with Team National and had actually been a member and marketing director of the company since February 2003. Regardless, the claimant provided the employer with a letter verifying he agreed to "cease and desist as an independent marketing director of Team National effective April 6, 2005." The employer did not advise the claimant to remove himself as the independent marketing director but to cease and desist "all business with Team National." The claimant was to revise his conduct so that he was not in violation of the employer's conflict of interest policy.

The claimant continued to maintain a website for the competitor on which his name was prominently placed along with the competitor's logo. The employer became aware of the claimant's continued activity with Team National on June 7, 2005, and an investigation began on June 14, 2005. It discovered the claimant's web site provides access to a variety of companies selling goods and services, including telecommunications products/services, and the claimant was identified on the web site as an independent marketing director for Team National. His objective was to persuade consumers to access his web site, link into the various merchants and purchase those products. The purpose of this objective was that the claimant would receive a three to 30 percent commission on all products purchased through his web site. The employer met with the claimant on June 22, 2005, and the claimant pled ignorance of his continued violation. The employer agreed to give the claimant yet another chance by allowing him to remove his name from the site, but he told the employer he did not want to close the web site since he needed it to get his own discount. What the claimant did not disclose to the employer is that he could only continue to receive commissions from Team National if his web site was open. Without any additional knowledge, the employer relied on the claimant's assurance that he was no longer connected to this web site except as an independent consumer.

The issue would have probably been closed at that point, since the employer trusted the claimant at his word, but the claimant appeared overly concerned about the employer's connection to a local warehouse grocer. The employer offered its employees a discount with

this warehouse grocer and the claimant repeatedly questioned why this relationship was not considered to be a violation of the conflict of interest policy. On July 19, 2005, the employer went back through security and asked them to further look into the claimant's web site. It was discovered that although the claimant's name was not listed on the front page of this web site, if one went through the website, the claimant was clearly listed, along with his connection to Team National. He was discharged on July 20, 2005.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. 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 section 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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job

Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for violation of the employer's conflict of interest policy. Although the claimant denies knowing he was in violation of this policy, the Administrative Law Judge does not find his claim of ignorance credible since the claimant appears to be above average in intelligence. He was in violation of this policy starting in February 2003 and continued to be in violation until his date of discharge on July 20, 2005. The claimant's conduct was not in the best interests of the employer and he demonstrated a substantial disregard of the standards of behavior the employer had the right to expect of the claimant. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

DECISION:

The unemployment insurance decision dated August 8, 2005, reference 01, is affirmed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

sdb/kjw