

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ERIC A KOVALESKI

Claimant

APPEAL NO. 07A-UI-10026-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

QWEST CORPORATION

Employer

**OC: 09/30/07 R: 02
Claimant: Respondent (2)**

Section 96.5(2)a – Discharge
Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer, Qwest, filed an appeal from a decision dated October 25, 2007, reference 01. The decision allowed benefits to the claimant, Eric Kovaleski. After due notice was issued, a hearing was held by telephone conference call on November 14, 2007. The claimant provided a telephone number to the Appeals Section. That number was dialed at 3:01 p.m. and the only response was a voice mail. A message was left indicating the hearing would proceed without the claimant's participation unless he contacted the Appeals Section at the toll-free number prior to the close of the record. By the time the record was closed at 3:20 p.m. the claimant had not responded to the message and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. The employer participated by Telesales Manager Debra Thompson and was represented by Barnett Associates in the person of Steven Zaks. Exhibit One was admitted into the record.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Eric Kovaleski was employed by Qwest from July 28, 2003 until October 3, 2007, as a full-time sales consultant. On September 26, 2007, the claimant came to Telesales Manager Debra Thompson and said he was having trouble staying awake. She took him to a conference room where she observed him, noting he was frequently falling asleep and would not waken immediately as she came into the room. Under company policy she got a "reasonable suspicion" checklist and filled it out.

The results of the checklist indicated a drug screening test should be performed, and the claimant was taken to Concentra for a sample to be given. He was suspended pending the results of the test. The sample was sent to a certified laboratory and the employer was notified of the result on October 2, 2007. The sample had tested positive for a controlled substance.

Mr. Kovaleski met with Ms. Thompson on October 3, 2007, at which time he was notified of the test results, though the employer did not know which controlled substance had been detected. The claimant was "not surprised" and admitted he had "relapsed" and started "doing drugs again." He was discharged under the employer's policy prohibiting being under the influence of controlled substances in the workplace.

Eric Kovaleski has received unemployment benefits since filing a claim with an effective date of September 30, 2007.

The record was closed at 3:20 p.m. At 4:11 p.m. the claimant called and requested to participate. He had received the notice of the hearing prior to the hearing date and, contrary to the recommendation of the Appeals Section, elected to use a cell phone for the hearing. The phone was out of range when the call was made and the voice mail message was left at that time.

REASONING AND CONCLUSIONS OF LAW:

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 claimant admitted to the employer he had been ingesting controlled substances and was under the influence in the workplace. This is a violation of a known company policy and constitutes conduct not in the best interests of the employer. The claimant is disqualified.

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.

The claimant has received unemployment benefits to which he is not entitled. These must be recovered in accordance with the provisions of Iowa law.

The next issue is whether the record should be reopened. The judge concludes it should not.

871 IAC 26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

The claimant received the notice of hearing but did not accept the recommendation of the Appeals Section not to use a cell phone. As a result the cell phone did not receive the judge's call when it was placed at the time the hearing was scheduled. Although the claimant may have intended to participate in the hearing, he failed to read or follow the hearing notice instructions and used a cell phone. He also did not follow the instructions given to him at the time he provided his phone number, not to wait more than five minutes after the scheduled start time of the hearing before contacting the Appeals Section. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. The claimant did not establish good cause to reopen the hearing. Therefore, the his request to reopen the hearing is denied.

DECISION:

The representative's decision of October 25, 2007, reference 01, is reversed. Eric Kovaleski is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount provided he is otherwise eligible. He is overpaid in the amount of \$1,986.00.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css