

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**PETER W SIMON**

Claimant

**APPEAL NO. 07A-UI-05456-H2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**NEXT GENERATION WIRELESS INC**

Employer

**OC: 05-06-07 R: 12  
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge/Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the May 18, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 18, 2007. The claimant did participate. The employer did participate through (representative) Bill Bradford, Owner, Heather Hamilton, Area Sales Manager and Kristi Eastman, Business Manager. Employer's Exhibit One was received.

**ISSUE:**

Was the claimant discharged for work related misconduct?

**FINDINGS OF FACT:**

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a retail sales associate full time beginning October 11, 2004 through May 2, 2007 when he was discharged.

The claimant was discharged for not making sales quotas. The claimant had received a warning that his job was in jeopardy and performed the work to the best of his ability. The employer alleges that the claimant was guaranteed of making sales if he followed their suggestions. Such an allegation has not been established. The employer has not established that sales are automatic, no matter their contention that a cell phone is a "necessity." The claimant was supposed to figure out a way to sell cell phones by going out into the community, faxing businesses, e-mail business, taking out flyers, working at community events, and by contacting current customers. The fact that other employees do meet the sales goals, does not establish that all employees would be able to meet the sales goals.

The claimant went to neighboring business with flyers and cups, over the last few months of his employment. He went over the retention list and called those previous customers, and previous customer base, and offered them ability to add lines. The claimant asked customers who came into the store and did not purchase product to call him with questions, he also gave them his business card and followed up with calls to them to try to make sales.

## REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code § 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.

Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. IDJS*, 386 N.W.2d 552 (Iowa App. 1986). The claimant was not cut out for the job. The fact that the claimant was not "cut out" for sales work, is not intentional misconduct. The claimant only met the employer's sales goals twice during the entire time of his employment. The claimant did attempt to make his sales as his pay would increase with an increase in sales. The claimant did follow the employer's suggestions on how to make sales. Inasmuch as he did attempt to perform the job to the best of his ability but was unable to meet the employer's expectations, no intentional misconduct has been established, as is the employer's burden of proof. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

**DECISION:**

The May 18, 2007, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Teresa K. Hillary  
Administrative Law Judge

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Decision Dated and Mailed

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