

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES D MCPEEK
Claimant

APPEAL NO. 11A-UI-00389-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

QWEST CORPORATION
Employer

OC: 12/12/10
Claimant: Appellant (2)

Section 96.5-2-A – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated January 4, 2011, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on February 14, 2011. Claimant participated. Employer participated by Patty Maltese, Customer Service Manager. The employer was represented by Larry Lampel. The record consists of the testimony of Patty Maltese and the testimony of James McPeek.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a telecommunications company. The claimant was employed as a customer sales and service associate at a call center located in Sioux City, Iowa. The claimant was a full-time employee. He was hired on July 27, 2009. His last day of work was December 10, 2010. The date of termination was December 10, 2010.

The reason that the claimant was terminated was his failure to meet what the employer calls its "availability metric." The claimant handles customer questions and complaints by telephone. The employer requires that the claimant be available to take calls 90 percent of the time that he is working. The remaining ten percent of his time is to be used for bathroom breaks; and following up customer calls.

The claimant did not meet the availability metric in 11 out of the last 12 months of his employment. A meeting was held with the claimant in November 2010 concerning his failure to meet his metric and that termination could result if he continued to fall short of the requisite 90 percent. The claimant's metric in November 2010 was 88.79 per cent. The claimant was not

terminated until December 10, 2010. The claimant did meet the metric between the time of the meeting in November 2010, and the date of his termination.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659 (Iowa app. 1988) The employer has the burden of proof to establish misconduct.

The evidence established that the claimant was terminated because he did not meet what is known as an availability metric. The employer is telecommunications company and is legally required to have individuals available to take calls from customers. The claimant was required to be available 90 percent of the time. This meant that the claimant had 45 minutes out of each full time shift to attend to personal matters and follow up on customer calls. The claimant had a poor history of meeting his 90 percent metric.

There was a meeting in November 2010, where the claimant's performance was discussed. He had not met the metric in October 2010. There were numerous reasons for the claimant's failure to meet his metric. He took more frequent bathroom breaks because of a medical condition. The employer would not grant additional time for bathroom breaks unless the claimant got a medical note and the claimant did not get a medical note. The claimant did know that he could be terminated if he failed to meet his metric in the future.

The claimant did not meet his metric in November 2010. His metric was 88.79 percent. He was not terminated, however, until December 10, 2010. If his metric was measured following the meeting to the date of termination, he exceeded the 90 percent metric. The administrative law judge must conclude, therefore, that the claimant was not discharged for a current act of misconduct. The claimant's discharge was based on his performance in the month of November. He was not terminated and was allowed to work until December 10, 2010. If his metric is measured to the date of termination, there was no misconduct. Since the claimant was not terminated for a current act of misconduct, benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated January 4, 2011, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css