

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LAURA R OCONNELL
Claimant

APPEAL NO. 07O-UI-05763-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

QWEST CORPORATION
Employer

**OC: 08-27-06 R: 03
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 4, 2007, reference 06, decision that allowed benefits. After due notice was issued, a hearing was held on June 26, 2007. The claimant did participate. The employer did participate through Christine Dee Craig, Call Center Supervisor and Caryl Gilstrap, Call Center Supervisor and was represented by Jane Brantley of Barnett & Associates.

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 customer assistant agent full time beginning September 26, 2006 through March 19, 2007 when she was discharged.

The claimant was allegedly improperly holding a call on March 12, 2007. The claimant denies that she was improperly holding a call. There is no mechanical recording of the call to indicate if the call was being held improperly. Another employee was standing behind the claimant and alleges that she did not hear the claimant talking so the call must have been held improperly. The claimant alleges that she talks softly and the employee monitoring her just did not hear her speaking to the customer. Nancy Warnke, the employee who allegedly witnessed the claimant improperly holding the call did not testify at the hearing.

The claimant had been previously disciplined for failing to meet performance standards.

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.

The administrative law judge is not persuaded that the claimant was improperly holding a call on March 12, 2007. The claimant explained that because she was a soft talker the person monitoring her did not hear her speaking to the customer. The person who conducted the monitoring did not participate in the hearing. The claimant's testimony is credible. The claimant was not discharged for any attendance issues. While the claimant had not met performance standard issues in the past, she was discharged for improperly holding a call, not for failure to meet performance expectations. Even if the claimant were discharged for poor performance, 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). Inasmuch as she did attempt to perform the job to the best of her 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). The employer has not met their burden of proving misconduct. Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

DECISION:

The April 4, 2007, reference 06, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/pjs