

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ROGER W HURST**  
Claimant

**APPEAL NO. 08A-UI-04433-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BOBALEE INC**  
Employer

**OC: 04/06/08 R: 01  
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge  
Section 96.5-1 – Voluntary Leaving

**STATEMENT OF THE CASE:**

Bobalee, Inc. (employer) appealed a representative's May 1, 2008 decision (reference 01) that concluded Roger W. Hurst (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 22, 2008. The claimant participated in the hearing. Herb Besaw appeared on the employer's behalf and presented testimony from two other witnesses, Dan Soellner and George Anderson. One other witness, Dave Arndt, was available on behalf of the employer but did not testify. During the hearing, Employer's Exhibits One through Five were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

**FINDINGS OF FACT:**

The claimant started working for the employer on April 7, 1986. He worked full time as a sales account manager for the employer's hydraulic cylinder manufacturing business. His last day of work was April 10, 2008. At that time he was given the option to either quit or be fired, and he agreed to resign. The reason the employer presented the claimant with the ultimatum to quit or be discharged was an accumulation of job performance issues culminating in an issue regarding a failure to follow up with communication with a client.

On January 3, 2007 the claimant was given a three-day suspension for using the employer's Internet connectivity for personal purposes. (Employer's Exhibit Five.) The employer's policy prohibits the use of the employer's Internet service other than for company business; on June 12, 2008 the claimant had signed an acknowledgement by which he was allowed Internet access for using sales files, customer contacts and files, reaching prospective and current

customer websites, finding sales and marketing tools, and obtaining other business information. (Employer's Exhibit Six.)

On February 14, 2007, the claimant was given a less than adequate performance evaluation noting a problem with working on personal items and lack of drive and initiative in performing work. (Employer's Exhibit Four.) The employer continued to have concerns regarding the claimant's attention to his duties and on February 20, 2008 Mr. Soellner, the general manager, sent the claimant an e-mail as a follow-up to a February 19 discussion that began as a talk on the claimant's attendance. The employer reminded the claimant that it had several concerns regarding the claimant's "direction of [his] employment over the last couple of years," including a concern of unacceptable activity at the workplace. The employer advised the claimant it had given him as much leeway as they could and indicated that the claimant's job was in jeopardy; the claimant agreed that the employer had done more that needed to work with him and stated that he did not want to lose his job. (Employer's Exhibit Two.) On March 6, 2008 he was given another less than adequate performance evaluation; the evaluation cited several problems, including continued unacceptable non-work-related Internet use, poor work ethic, not setting a good example of having a desire to work hard, and not representing the sales department in a positive manner over the past year. (Employer's Exhibit Three.)

The claimant continued to use the employer's Internet access for non-work-related activities, such as opening websites regarding personal sales transactions and other web surfing; he persisted in this regular activity during the timeframe of April 1 through April 10. On April 1 one of the employer's clients had sent the claimant a change order requesting a response. When the claimant did not send a response, the client sent another e-mail on April 3 requesting a response "ASAP." When the claimant again did not send a response, the client sent a third e-mail on April 8 again asking for a reply "ASAP." When the claimant still had not replied by April 9, the client called the employer and requested assistance. The client's call was routed to Mr. Anderson, who was able to resolve the question within about 20 minutes. Mr. Soellner inquired of the claimant on the e-mails on the morning of April 10; the claimant acknowledged that he had received the e-mails but had not perceived there was a critical need to make an immediate response to the client. As a result of the claimant's handling of this final situation after the prior concerns and warnings relating to proper attention to his job duties, the employer determined it could no longer maintain the claimant in his employment.

#### **REASONING AND CONCLUSIONS OF LAW:**

A claimant is not eligible for unemployment insurance benefits if he quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct. Iowa Code §§ 96.5-1; 96.5-2-a

871 IAC 24.25 provides that, in general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. Bartelt v. Employment Appeal Board, 494 N.W.2d 684 (Iowa 1993). The claimant did not have the intent to sever the employment relationship necessary to treat the separation as a "voluntary quit" for unemployment insurance purposes; he did not have the option to continue his employment; he could either quit or be discharged. 871 IAC 24.26(21). As the separation was not a voluntary quit, it must be treated as a discharge for purposes of unemployment insurance.

The next issue in this case is then whether the employer effectively discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right or even had any other choice but to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). 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 § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Past acts and warnings can be used to determine the magnitude of a current act of misconduct. 871 IAC 24.32(8).

The claimant's extreme neglect of the client's communications while during the same timeframe continuing his personal Internet usage for which he had previously been disciplined, particularly where the employer had clearly advised the claimant that his attention to his work ethic was unsatisfactory and was placing his job in jeopardy, shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer effectively discharged the claimant for reasons amounting to work-connected misconduct.

Iowa Code § 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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

**DECISION:**

The representative's May 1, 2008 decision (reference 01) is reversed. The claimant did not voluntarily quit but the employer effectively discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of April 10, 2008. This disqualification continues until the claimant has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged. The claimant is overpaid benefits in the amount of \$1,800.00.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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