

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL A CLARKE
Claimant

APPEAL NO. 08A-UI-06615-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

QWEST CORPORATION
Employer

OC: 06/15/08 R: 01
Claimant: Respondent (4/R)

Section 96.5-2-a – Discharge
Section 96.5-1 – Voluntary Leaving
Section 96.7-2-a(2) – Charges Against Employer’s Account

STATEMENT OF THE CASE:

Qwest Corporation (employer) appealed a representative’s July 9, 2008 decision (reference 01) that concluded Michael A. Clarke (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 August 4, 2008. The claimant participated in the hearing. Steve Zaks of Barnett Associates appeared on the employer’s behalf and presented testimony from two witnesses, Jay Castelbaum and Steve Aman. 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.

ISSUES:

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? Is the employer’s account subject to charge?

FINDINGS OF FACT:

The claimant started working for the employer on March 17, 2008. He worked full time as a customer sales and service associate in the employer’s Sioux City, Iowa, call center. His last day of work was June 16, 2008.

As of June 16 the claimant was entering the last week of his 13-week performance assessment period with the employer. The claimant’s performance throughout this period had been less than acceptable, primarily due to a lack of self-confidence on his part when dealing with customers. On June 16, Mr. Castelbaum reviewed the claimant’s performance with him. In order to achieve a sufficient performance level in order to be retained after the 13-week period, the claimant’s daily sales volume would have to multiply approximately ten-fold for each day through the end of the week. His daily sales volume was typically between \$200.00 and \$300.00; in order to improve sufficiently to retain his employment, he would have had to average about \$2,000.00 per day for the remainder of the week. His highest daily sales volume

prior to this would have been approximately \$1,000.00 on one or two days when he had taken calls from customers who already had decided to add the services. Had the claimant not resigned on June 16, he would have been allowed to continue to work through June 20. To an acceptable degree of mathematical certainty, he would not have been able to achieve the necessary sales levels to pass the assessment period, and would have been discharged on June 20.

In the discussion with Mr. Castelbaum, concluding that it was a virtual impossibility for him to achieve the necessary sales volumes needed to be retained and deciding that he would prefer to quit than be fired, the claimant advised Mr. Castelbaum that he would quit.

The claimant established an unemployment insurance benefit year effective June 15, 2008. He filed weekly claims and received unemployment insurance benefits for weeks thereafter, including the week ending June 22, 2008.

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; in this case, the claimant realistically did not have the ability to continue his employment. While the claimant tread dangerously close to leaving prior to being advised by the employer that he would actually be fired, in this case the timing was just close enough to persuade the administrative law judge that the employer also knew to a mathematical certainty that the claimant would be discharged if he did not quit. 871 IAC 24.25(33). However, it is also clear that the termination would not have occurred until June 20, 2008 and that the claimant could have worked the remainder of the work week, but he quit in advance of the inevitable discharge; he would not be eligible for benefits for the period preceding the inevitable discharge. 871 IAC 24.25(40); 871 IAC 24.26(13). However, as the final separation was not a voluntary quit, as of June 20 the separation must be treated as a discharge for purposes of unemployment insurance. 871 IAC 24.26(21).

The next issue in this case is then whether the employer effectively discharged the claimant as of June 20, 2008 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).

The reason the employer effectively discharged the claimant was lack of satisfactory job performance. Misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra. There is no evidence the claimant intentionally failed to perform to the best of his abilities. The claimant's actions that led to the loss of his job were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits. Benefits are allowed as of the week beginning June 22, 2008, if the claimant is otherwise eligible.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. In this case, the claimant received benefits for the week ending June 21, 2008 but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded the Claims Section.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code § 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code § 96.19-3. The claimant's base period began January 1, 2007 and ended December 31, 2007. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

DECISION:

The representative's July 9, 2008 decision (reference 01) is modified in favor of the employer. The claimant did not voluntarily quit and the employer did effectively discharge the claimant as of June 20, 2008 but not for disqualifying reasons. As of that date, the claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible. In anticipation of the June 20 discharge, the claimant did voluntarily quit and did not work the remainder of the week

available to him. The claimant is disqualified from receiving unemployment insurance benefits for the week ending June 21, 2008. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue. The employer's account is not subject to charge in the current benefit year.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css