IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JON M VAN WYK
Claimant

QWEST CORPORATION
Employer

APPEAL NO. 07A-UI-08715-DWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/05/07 R: 02
Claimant: Respondent (1)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Qwest Corporation (employer) appealed a representative's September 4, 2007 decision (reference 01) that concluded Jon M. Van Wyk (claimant) was qualified to receive unemployment insurance benefits, and the employer's account was subject to charge because the claimant had been discharged for disqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 26, 2007. The claimant participated in the hearing. Terry Newman, a representative with Barnett Associates, Inc., appeared on the employer's behalf. Jay Gregerson, a team lead, Paula Konrad, and Jamie McAllister, a lead human resource representative, appeared on the employer's behalf. 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:

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on September 22, 2003. The claimant worked as a full-time sales manager. Gregerson was the claimant's supervisor. At least annually employees review the employer's code of conduct policy by taking an on-line training course. The claimant most recently completed this training on April 30, 2007.

Prior to July 2007, the employer talked to the claimant about perception customers and peers had of him, but the employer had not given the claimant any written warnings for the way he talked to customers or co-workers.

The claimant began managing a new team of employees on May 1, 2007. By early July, the claimant had given three members of his team, final written warnings for attendance issues. On July 18, A.W., made an EEO complaint against the claimant. A.W. complained that the claimant made an offensive comment to her and made other offensive comments and gestures at work. A.W. was one of the employees the claimant gave a final written warning for attendance issues.

The employer investigated A.W.'s complaint. During the investigation, the employer learned that in an attempt to get A.W's attention, A.W. and J. reported the claimant said, "Suuu-eeee," to A.W. Since A.W. is a large person, this comment was especially offensive to A.W. J. reported hearing the comment and telling the claimant that he should not make a such comment. The claimant told J. that he was just trying to get A.W.'s attention. When the employer talked to the claimant, he told the employer he had only told A.W., "You – who." When J. had asked the claimant if he said "Sooo-eee," to A.W., he told her he had only said, "You- who," to A.W.

Employees also reported the claimant frequently put up three fingers and told them to read between the lines. Employees found this offensive because this gesture was the same as showing another person the middle finger or flipping a person "a bird." When the employer talked to the claimant, he denied ever using this gesture. The claimant acknowledged that other people on his team used this gesture. He had not said anything, because no one appeared offended and joked when doing this. Employees also reported that during an ice-breaker, the claimant asked employees what they wanted as an ideal car. After B. described his ideal car, an employee asked if the car was for his hoes. People that claimant managed attributed this comment to the claimant. When the employer talked to the claimant, he acknowledged that someone, not the claimant, made this comment and people laughed. The claimant did not understand the comment or how it was funny because he did not know what the word "hoes" meant. The three employees the employer talked to and reported offensive comments by the claimant had been disciplined by the claimant and had received final written warnings for attendance issues.

Based on the employer's investigation, the employer concluded the claimant violated the employer's code of conduct and was not professional in the workplace. On July 31, 2007, the employer informed the claimant he was discharged.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The employer established business reasons for discharging the claimant. If the evidence had supported the employees' complaints about offensive statements and gestures the claimant allegedly made, the claimant may have committed work-connected misconduct. In this case the

employer relied on unsupported hearsay information from employees who the claimant had recently disciplined. The claimant's testimony must be given more weight than the employer's reliance on unsupported hearsay information from witnesses who did not testify at the hearing. As a result, a preponderance of the credible evidence does not establish that the claimant committed work-connected misconduct.

The fact the claimant did not address the three-fingered gesture is troubling, but he had been told to "lighten up" about enforcing all the employer's rules. Since the gesture appeared to be used by everyone in a joking manner, the claimant's failure to address this at most amounts to an error in judgment, but not work-connected misconduct. As of August 5, 2007, the claimant is qualified to receive unemployment insurance benefits.

DECISION:

The representative's September 4, 2007 decision (reference 01) is affirmed. The employer discharged the claimant for reasons that do not constitute work-connected misconduct. As of August 5, 2007, the claimant is qualified to receive unemployment insurance benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

_____
Debra L. Wise
Administrative Law Judge

_____
Decision Dated and Mailed

dlw/css