IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

Appeal Number: 06A-UI-01586-RT
OC: 01-08-06 R: 01
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

BRADLEY L GREEN
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N SIOUX CITY SD 57046-3126

QWEST CORPORATION
C/O EMPLOYER'S UNITY INC
NOW TALX CORPORATION
PO BOX 749000
ARVADA CO 80006-9000

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Qwest Corporation, filed a timely appeal from an unemployment insurance decision dated January 30, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Bradley L. Green. After due notice was issued, a telephone hearing was held on February 27, 2006, with the claimant participating. Lisa Bechtoff was available to testify for the claimant but not called because her testimony would have been repetitive and unnecessary. Trina Wingert, Manager, participated in the hearing for the employer. The employer was represented by Beth Crocker of Employer's Unity, Inc., now TALX Corporation. Dawn Boston, Rick Gutierres, and Veronica Madrid were available to testify for the employer but not called

because their testimony would have been repetitive and unnecessary. Employer's Exhibits One and Two were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One and Two, the administrative law judge finds: The claimant was employed by the employer as a full time sales and service consultant from May 23, 2005 until he was suspended on January 6, 2006 and then discharged on January 10, 2006. The claimant was suspended and then discharged for allegations that he was "slamming" meaning that he was adding things to customers' accounts without authorization and "cramming" meaning placing orders for additional matters not ordered or authorized by the customer. The employer has written policies in its code of conduct prohibiting this behavior. The claimant got a copy of these policies and signed an acknowledgment therefore and was aware of those policies. The policies are referred to in the transcript of the meeting between the claimant and the employer's witness, Trina Wingert, Manager, as shown at Employer's Exhibit Two. The policies are also referred to in the discharge letter, the first page of which appears at Employer's Exhibit One and the second page of which, although not part of the Exhibit, the claimant signed. The claimant's job is to take calls from customers or potential customers and enter sales or orders of various plans or other items ordered or purchased by the customer. These telephone calls are randomly taped and reviewed by the employer.

On December 22, 2005, the claimant took a call from a customer who wanted to order international long distance service. The employer can only offer international long distance service if the customer also takes the employer's domestic long distance service. The claimant explained this to the customer and the customer repeated that he wanted the international long distance service from the employer. The claimant entered the international long distance service and the domestic long distance service into the computer as ordered by the customer. The claimant is expected to review the costs of the orders or plans with the customer. The claimant was experiencing some errors and difficulties with his computer and lost track of where he was in informing the customer of the various charges for the domestic long distance plan. The claimant did provide some costs to the customer of the domestic long distance plan but omitted other costs associated with the long distance domestic plan. The claimant did not fully explain to the customer the costs of the domestic long distance plan. A tape of this call was reviewed by the employer and the claimant was then suspended on January 6, 2006 and discharged on January 10, 2006.

The employer performed a sales order audit on the claimant's other orders and alleged that the claimant had entered orders for plans on five other occasions without authorization but the evidence for this was very vague and the claimant was never confronted with these matters as he was with the telephone call on December 22, 2005. The claimant received an oral warning pursuant to questioning about an order on November 9, 2005 that he had taken adding DSL and long distance service for a customer. The customer had actually called the claimant and ordered that service but later denied it. The claimant also received an oral warning on November 15, 2005 for adding DSL to a customer's account. Again, the customer had ordered the DSL but later repudiated the order. Pursuant to his claim for unemployment insurance benefits filed effective January 8, 2006, the claimant has received unemployment insurance benefits in the amount of $1,073.00 for seven weeks from benefit week ending January 14, 2006 to benefit week ending February 25, 2006. For five of those weeks the claimant reported earnings which reduced his unemployment insurance benefits for those weeks.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.

2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

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, (9) provide:

> 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

> (9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

The parties agree, and the administrative law judge concludes, that the claimant was suspended on January 6, 2006 and then discharged on January 10, 2006. Whenever a claimant is unemployed as a result of a disciplinary lay-off or suspension imposed by the employer, the claimant is considered as discharged and therefore the administrative law judge concludes that the claimant was effectively discharged on January 6, 2006. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6 (2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct.

The employer's witness, Trina Wingert, Manager, testified that the claimant was discharged for "slamming" and "cramming" meaning that he put or placed orders for customers for items or plans not authorized or ordered. Ms. Wingert testified to an order taken by the claimant by telephone on December 22, 2005 which order had been randomly tape recorded. The customer ordered a long distance international plan from the employer. In order for a customer to obtain an international long distance plan from the employer the customer must also have a domestic long distance plan with the employer. The claimant so informed the customer. The claimant then proceeded to explain the costs of both but lost track of where he was because of computer difficulties and failed to fully explain the costs of the domestic long distance plan. The claimant is required to fully inform customers of all costs. The claimant did not do so. The employer has policies prohibiting this behavior, "slamming" and "cramming," in its code of conduct, a copy of which the claimant received and for which he signed an acknowledgment and of which he was aware. The policies are referred to at Employer's Exhibits One and Two.

Ms. Wingert also testified that pursuant to a sales order audit of other orders made by the claimant that the claimant was accused of violating similar rules on five other orders. However, the evidence concerning these alleged five violations are so vague and inconclusive, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant actually violated the employer's rules during those phone calls or that those violations were disqualifying misconduct. Concerning the order on December 22, 2005 which really triggered the claimant's discharge, the administrative law judge is constrained to conclude that there is not a preponderance of the evidence that the claimant's behavior was willful or deliberate and therefore there is not a preponderance of the evidence that the claimant committed during that occasion any deliberate acts or omissions constituting a material breach of his duties and obligations arising out of his worker's contract of employment or that evince a willful or wanton disregard of the employer's interests and therefore his conduct is not disqualifying misconduct for those reasons.

It was only after the claimant had testified that Ms. Wingert conceded that in order for a customer to purchase the employer's international long distance plan the customer must also purchase the employer's domestic long distance plan. The claimant was accused of signing the customer up for the domestic long distance plan in violation of the employer's policies. However, the claimant had to sign the customer up for the domestic long distance plan in order to provide the customer with the employer's international long distance plan. Ms. Wingert then testified that the claimant did not disclose fully the costs of the domestic long distance plan. The claimant concedes that he did not. The claimant was in the process of informing the customer of the costs but lost track of where he was because of computer difficulties. The evidence establishes the claimant did review some of the costs but not all of the costs. The

administrative law judge is constrained to conclude that this was not willful or deliberate but was merely negligence on the part of the claimant. The issue then becomes whether the claimant's behavior was carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct.

Although it is a close question, the administrative law judge concludes here that the claimant's acts of failing to disclose the entire costs of the domestic long distance plan on December 22, 2005, are not carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. As noted above, the evidence on the alleged five other violations that arose during the sales order audit, the evidence is too vague and inconclusive to establish any wrong doing on the claimant's part. The claimant did receive two oral warnings of some sort on November 9, 2005 and November 15, 2005. However, on both occasions the claimant credibly testified that the customer actually ordered what the claimant placed for the customer and then the customer later repudiated it. There is a serious question as to whether the customer on November 9, 2005 actually did not order the plans or make the call. The claimant conceded that he was questioned about the call but denied a warning and the claimant's testimony here is credible. The administrative law judge concludes that there is not a preponderance of the evidence that the claimant actually committed any offenses for the warning on November 9, 2005 or in fact received a verbal warning on November 9, 2005. Concerning the verbal warning on November 15, 2005, Ms. Wingert was more adamant that the claimant had received such a verbal warning for adding DSL to a customer's account when the customer had not ordered it. The claimant first denied the warning and then said he did not recall the warning. The administrative law judge is constrained to conclude that the claimant did receive some kind of oral warning on November 15, 2005. The issue then really becomes whether this warning on November 15, 2005 coupled with the claimant's negligence on December 22, 2005 establishes recurring negligence. The administrative law judge concludes that it does not. The claimant had explanations as to his negligence on December 22, 2005. Further, the only warning received by the claimant prior to that time was the oral warning on November 15, 2005 as noted above. Accordingly, the administrative law judge concludes the claimant's acts giving rise to his discharge were not carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct but were rather ordinary negligence in isolated instances or good faith errors in judgment or discretion and are not disqualifying misconduct.

In summary, and for all of the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature including the evidence therefore. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided he is otherwise eligible.

Iowa Code section 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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $1,073.00 since separating from the employer herein on or about January 6, 2006 and filing for such benefits effective January 8, 2006. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of January 30, 2006, reference 01, is affirmed. The claimant, Bradley L. Green, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

kkf/tjc