

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

ANDREW SHIRLEY
Claimant

ACOSTA INC
Employer

APPEAL 21A-UI-02694-SN-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 11/08/20
Claimant: Appellant (2)

STATEMENT OF THE CASE:

The claimant filed an appeal from the January 4, 2021, 2021, (reference 02) unemployment insurance decision that denied benefits based on the conclusion he voluntarily quit his position. The parties were properly notified about the hearing. A telephone hearing was held on April 5, 2021. Claimant participated and testified. He was represented by Peggy Michelotti, attorney at law. Employer did not participate. Exhibit A and B were admitted into the record.

ISSUE:

Was the separation a layoff, discharge for misconduct or voluntary quit without good cause attributable to the employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant was employed full-time as a merchandiser from November 18, 2019, until he was separated from employment on December 9, 2019, when he was terminated. The claimant's immediate supervisor was Christine Baizley.

On November 18, 2019, the claimant applied for the merchandiser position. That same day, the claimant spoke with recruiter, Krystal Metcalf on several occasions about the position. In those conversations, the claimant asked Ms. Metcalf if he would be required to perform sales functions based on the position description listed below. Ms. Metcalf assured the claimant that the position did not require him to perform sales functions.

The claimant provided a copy of the application he responded. (Exhibit A) It gave the following overview for the position, "The retail coverage merchandiser primarily provides retail sales merchandising coverage and coverage of retail special projects for an assigned retail territory. They are responsible for representing Acosta and out principals through store coverage and executing objectives as set forth by their manager to achieve superior in-store results in an assigned territory." Under responsibilities, the advertisement states the merchandiser position would, "Deliver sales fundamentals (distribution, shelving, and merchandising) goals in assigned territory." In the context of Ms. Metcalf's assurance he would not have to perform sales, the

claimant interpreted these two statements to mean that he would merely be performing a support role to a separate sales position by building up displays and restocking them.

After accepting the position, the claimant received a device which stated he would have to sell at least six displays for each of the five stores he was assigned to. He was also required to increase the amount of stock each store ordered. These sale duties were never mentioned by Ms. Metcalf. Despite being uncomfortable with performing sales functions, the claimant attempted to perform these extra duties.

On December 9, 2019, Ms. Baizley informed the claimant that he was not performing the sales requirements of his position to the employer's satisfaction. In response, the claimant stated he did not believe he could perform the sales functions and added that he only took the job based on Ms. Metcalf's assurance that there would not be sales functions. In response, Ms. Baizley said he should have known that the position had sales functions and asked the claimant to turn in his equipment.

On January 6, 2021, the employer reposted the sales merchandiser position. The claimant provided a copy of this reposted position. (Exhibit B) This document revised the sections described earlier to clarify the position had sales functions.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant did not quit, but was discharged from employment for no disqualifying reason.

As a preliminary matter, the administrative law judge will evaluate whether the claimant quit his position.

Iowa Code §96.5(1) provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2) (amended 1998). Generally, when an individual mistakenly believes they are discharged from employment, but was not told so by the employer, and they discontinue reporting for work, the separation is considered a quit without good cause attributable to the employer. *LaGrange v. Iowa Dep't of Job Serv.*, (No. 4-209/83-1081, Iowa Ct. App. filed June 26, 1984).

In this case, the claimant stated he was not comfortable performing the sales functions of his position to Ms. Baizley. The claimant also stated Ms. Metcalf assured him the position would not have sales functions when it was presented to him. In response, Ms. Baizley informed him that he would be terminated because he should have been aware of the sales functions of the position. In this context, the claimant's statement that he did not believe he could perform the sales functions of the role cannot constitute an overt act to terminate his employment.

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 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.

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).

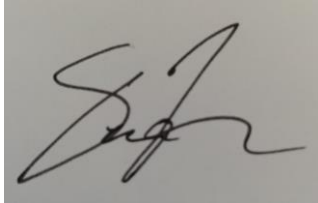
The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986). Here, the claimant had just begun his employment with this company and was informed that he was not performing sales functions to the employer's satisfaction. There is nothing in the record to show the claimant intentionally performed his sales functions poorly. *Cosper v. Iowa Dep't of Job*

Serv., 321 N.W.2d 6 (Iowa 1982). Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed. Benefits are granted.

DECISION:

The January 4, 2021, reference 02, decision is reversed. The claimant was discharged due to non-disqualifying conduct. Benefits are allowed, provided the claimant is otherwise eligible.

A handwritten signature in black ink, appearing to read 'Sean M. Nelson', is written over a light gray rectangular background.

Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 725-9067

April 9, 2021
Decision Dated and Mailed