

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SEAN P KELLEY
Claimant

APPEAL NO: 15A-UI-04888-LDT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NEXT GENERATION WIRELESS INC
Employer

OC: 04/05/15
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Next Generation Wireless, Inc. (employer) appealed a representative's April 21, 2015 decision (reference 01) that concluded Sean P. Kelley (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 June 2, 2015. The claimant participated in the hearing and was represented by Emilie Roth Richardson, attorney at law. Amy Larsen appeared on the employer's behalf and presented testimony from one other witness, Jose Ortiz. Based on the evidence, the arguments of the parties, a review of the law, and assessing the demeanor and credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on June 9, 2014. He worked full time as a wireless consultant in the employer's Dubuque, Iowa retail location. His last day of work was April 8, 2015. The employer discharged him on that date. The reason asserted for the discharge was an assortment of issues it asserted had occurred after February 13, 2015.

Prior to February 13 the employer had given the claimant a warning on September 1, 2014 for an incident where the business's front door was left unlocked and a warning on December 6, 2014 for tardiness. No further warnings were given to the claimant until his discharge on April 8.

The employer asserted that the claimant had been spoken to on February 13 regarding following anti-fraud procedures to prevent fraud or theft by customers. No evidence was

presented to indicate that the claimant had violated these procedures or had ignored the instructions once they were provided to him. The employer further indicated that on February 24 the claimant had processed unauthorized discounts. The claimant denied that the discounts were unauthorized at the time the discounts were allowed. On March 19 there was a complaint by a customer that the claimant had indicated that there would not be charges for a phone to be repaired; however, the claimant had only advised the customer that there would not be charges if the repair did not necessitate getting into the internal phone mechanism, which it ended up requiring.

Larsen asserted that the final incident was that on March 26 when the claimant made unprofessional comments within a customer's hearing about a customer service consultant. The claimant acknowledged that he had made a remark that if the customer service consultant had not wanted to come in to work that day she should have "called off." Larsen, the human resources manager, said nothing about any further issues after March 26; however, Ortiz, then the area sales manager, asserted that the claimant had committed insurance fraud on April 3 by telling a customer to say that a phone had been lost instead of broken, and that on April 4 he improperly upgraded a customer without using points as required. Ortiz based his conclusion on the report by another employee. The claimant denied that he had told a customer to lie about breaking the phone. He denied that he upgraded on April 4 without redeeming the customer's points; rather, as the store itself cannot physically redeem the points, he had properly contacted customer service to arrange to have the points redeemed.

Coincidentally, on April 1 the claimant had contacted the employer to raise concerns about alleged improprieties committed by the manager of the store.

REASONING AND CONCLUSIONS OF LAW:

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). The question is not whether the employer was right 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 matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

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. Rule 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. Rule 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. Rule 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 cited by the employer for discharging the claimant is the supposed litany of offenses occurring after February 13. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant committed misconduct for the incidents as asserted. While the claimant's comment about the customer service representative on March 26 was not perfectly professional, the employer has not established that the comment was substantial misbehavior, as compared to inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, or a good faith error in judgment or discretion. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The fact that the testimony of Larsen and Ortiz did not match as to what the asserted "final incident" was which lead to the discharge undermines the employer's credibility and lends credence to the claimant's belief that the discharge was largely prompted by the complaint he had filed about the store manager. The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's April 21, 2015 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs