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

WILLIAM B MORAN
604 N 7TH ST
GRIMES IA 50111

QWEST CORPORATION
C/O EMPLOYERS UNITY INC
NOW TALX UC CORPORATION
PO BOX 749000
ARVADA CO 80006-9000

Appeal Number: 06A-UI-00422-RT
OC: 12-11-05 R: 02
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.

_____
(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 5, 2006, reference 01, allowing unemployment insurance benefits to the claimant, William B. Moran. After due notice was issued, a telephone hearing was held on January 30, 2006, with the claimant participating. Scott Hogue, Executive Vice President of Union Local 7102 was available to testify for the claimant but not called because his testimony would have been repetitive, irrelevant, and unnecessary. Alice Lucia, Customer Service Manager in the employer's Des Moines, Iowa, location, participated in the hearing for the employer. The employer was represented by Beth Crocker from Employers Unity, Inc., now TALX UC Corporation. Employer's Exhibit One was admitted into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibit One, the administrative law judge finds: The claimant was employed by the employer as a full time sales and service consultant, from January 5, 2004 until he was discharged on December 10, 2005. The claimant was discharged for an alleged violation of the employer's code of conduct as shown at Employer's Exhibit One. The claimant was accused of changing a customer's account and service on December 5, 2005, without the customer's consent. On that day a customer called the claimant. The customer requested first that the claimant remove Global Crossing as the customer's long distance provider. The claimant discussed with the customer a new long distance provider, namely, Qwest. The customer did not request that Qwest be substituted as its long distance provider. The claimant determined to do two different service orders; one removing Global Crossing as requested by the claimant and one setting up Qwest as the long distance provider. The claimant determined to cancel the assignment of long distance service to Qwest if the customer did not want it. The customer did not so request that its long distance provider be Qwest but the claimant forgot to cancel that order. Apparently the claimant had the intrastate long distance carrier as Qwest and the interstate carrier as Global Crossing. The customer requested that Global Crossing be removed but did not request that Qwest be substituted for the interstate long distance carrier. The employer operates under a federal regulation that requires when a customer changes a long distance carrier that a third party confirm the customer's request. The claimant did not do so but rather showed that the customer had no such carrier. After the claimant had removed Global Crossing, the customer had no long distance provider at least for interstate telephone calls.

The employer has a code of conduct as shown at Employer's Exhibit One prohibiting placing an order for Qwest products and services on behalf of a customer without that customer's authorization and prohibiting deceiving a customer and requiring all legal disclosures. This code of conduct is available on the computer and the claimant read the code of conduct as shown by the third page of Employer's Exhibit One and the claimant was aware of the policies.

It is possible for the claimant, as it is for other employees, to cancel an order and if the order in question had been cancelled, the claimant would not have been in violation of the employer's policies. However, the claimant forgot to cancel the order. When the claimant was speaking to the customer, he entered an order removing Global Crossing but then had some computer problems and he attempted to address those problems but unsuccessfully. The claimant then decided to do the second order putting Qwest as the long distance carrier for the customer and then cancel it if necessary. The claimant requested help on this particular situation but received none. The claimant had never been accused of any such behavior before nor had the claimant ever received any relevant warnings or disciplines. Pursuant to his claim for unemployment insurance benefits filed effective December 11, 2005, the claimant has received unemployment insurance benefits in the amount of $2,569.00 as follows: $367.00 per week for seven weeks from benefit week ending December 17, 2005 to benefit week ending January 28, 2006.

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 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 parties agree, and the administrative law judge concludes, that the claimant was discharged. The parties disagree on the date; the claimant testified that he was discharged on December 14, 2005, the employer testified that the claimant was discharged on December 10, 2005. Although it makes little difference here, the administrative law judge concludes that the claimant was discharged on December 10, 2005. 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. Although it is a close question, 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 only reason for the claimant's discharge was an alleged violation of the employer's code of conduct when the claimant entered two service orders for a customer that the customer had not requested.

The employer's witness, Alice Lucia, Customer Service Manager in the employer's Des Moines, Iowa, location, testified that the claimant entered two service orders, the first a removal of Global Crossing as the customer's interstate long distance carrier. Ms. Lucia testified that the customer had not requested such a removal. The claimant was adamant that the customer had requested the removal and the administrative law judge finds the claimant's testimony here credible. The claimant repeatedly testified that the customer clearly asked that Global Crossing be removed as the customer's long distance interstate provider. Ms. Lucia merely testified from what she heard on a recording and testified that she did not believe that the customer made such a request. The administrative law judge concludes here that the customer either made the request or the claimant legitimately and justifiably believed that the customer had made such a request. The second order was substituting Qwest as the long distance interstate carrier. Even the claimant concedes that the customer had not done so but the claimant testified credibly that he was having computer problems and therefore he put the change in intending to cancel it if the customer did not make such a request. The claimant then testified that he forgot to cancel the order substituting Qwest. The administrative law judge is constrained to conclude that there is not a preponderance of the evidence that the claimant's two orders were deliberate acts or omissions constituting a material breach of his duties and obligations arising out of his worker's contract of employment or that they evince a willful or wanton disregard of the employer's interests and are not disqualifying misconduct for those reasons.

The administrative law judge does conclude that the claimant's acts here were negligent at least in so far as he failed to cancel the order substituting Qwest for the interstate long distance carrier and perhaps even negligent in believing that the customer had requested the removal of Global Crossing. However, the administrative law judge does not believe that the claimant did either willfully and deliberately. The issue then becomes whether these acts of carelessness or negligence were in such a degree of recurrence as to establish disqualifying misconduct. The administrative law judge concludes that here they were not. There is no evidence whatsoever that the claimant had ever been accused of any similar behavior before or that the claimant had ever received any relevant warnings. Accordingly, the administrative law judge concludes the claimant's acts were not carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct but, at most, the claimant's acts were 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. 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 $2,569.00 since separating from the employer herein on or about December 10, 2005 and filing for such benefits effective December 11, 2005. 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 5, 2006, reference 01, is affirmed. The claimant, William B. Moran, 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/kjw