

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

STEPHEN E LONG

Claimant,

and

QWEST CORPORATION

Employer.

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HEARING NUMBER: 11B-UI-13443

**EMPLOYMENT APPEAL BOARD
DECISION**

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A, 96.3-7

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Stephen Long (Claimant) worked as a full-time screening consultant for Qwest Corporation (Employer) from June 26, 1996 until he was fired on June 2, 2010. (Tran at p. 2-3; p. 18). He was fired for the stated reason of unprofessional conduct. (Tran at p. 3; p. 18).

The Claimant received discipline for reasons stated to be related to professionalism on June 11, 2009, on about August 4, 2009, and February 5, 2010. (Tran at p. 4; p. 5; p. 8-9; p. 15). The Claimant was counseled on March 18, 2010, for the stated reason of poor tone on a call. (Tran at p. 10-11). A quality study complaint was given to the Claimant on April 21, 2010, after the

Claimant was rated poor on a call. (Tran at p. 11). Another quality assurance study was performed on the Claimant's calls May 6, 2010, and the Claimant was rated poor which resulted in further counseling. (Tran at p. 11-12). The Claimant was generally receptive to feedback given to him. (Tran at p. 16).

The final incident which caused the Claimant's discharge was a call he handled on May 22, 2010. (Tran at p. 19). A complaint about this call was received by the Employer on May 27, 2010. (Tran at p. 12). The Employer investigated the complaint and determined that the Claimant's call was contrary to the code of conduct and the Claimant was terminated as of June 2, 2010. (Tran at p. 13-14; p. 19). The Employer has failed to prove by preponderance that the Claimant showed intentional disrespect to the customer on May 22, or that he otherwise engaged in unprofessional conduct towards that customer. (Tran at p. 20; p. 23).

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2011) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects 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 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 substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence. We have found credible the Claimant's description of the call. Principally the customer was already very upset for having been on hold, and for someone else having hung up on her. (Tran at p. 20; p. 23). Also we find credible that the Claimant did his best to help the customer, and did not chuckle at her. (Tran at p. 20-21).

Even taking into account the Claimant's history of discipline we find that the Employer has failed to prove that the Claimant's final call met the standard for misconduct. The call was a frustrating one for the customer, but we do not think the Employer has been able to show that the Claimant is the one to blame for this. Certainly, the Employer has failed to prove the Claimant was *intentionally* giving poor customer service. (Tran at p. 22). True, the history of the Claimant supports that even when trying his best the Claimant sometimes does not come off well in a call. But we do not have "quantifiable or objective evidence that shows [the Claimant] was capable of performing at a level better than that at which he usually worked." *Lee v. Employment Appeal Board*, 616 NW2d 661, 668 (Iowa 2000). At the most the Employer has shown that the Claimant's best was not good enough – not that the Claimant was intentionally providing poor service. Even the Employer admits that the Claimant was receptive to feedback and treated it as a learning experience. (Tran at p. 16). Misconduct has not been proven and benefits are allowed.

DECISION:

The administrative law judge's decision dated January 5, 2011 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for no disqualifying reason.

Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible. Any overpayment which may have been entered against the Claimant as a result of the Administrative Law Judge's decision in this case is vacated and set aside.

John A. Peno

Monique F. Kuester

Elizabeth L. Seiser

RRA/fnv