

**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**

**AUSTIN R HAWKINS
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DES MOINES IA 50315**

**QWEST CORPORATION
c/o EMPLOYERS UNITY INC
PO BOX 749000
ARVADA CO 80006-9000**

**Appeal Number: 05A-UI-05858-DT
OC: 05/01/05 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
Section 96.7-2-a(2) – Charges Against Employer's Account

STATEMENT OF THE CASE:

Qwest Corporation (employer) appealed a representative's May 25, 2005 decision (reference 02) that concluded Austin R. Hawkins (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 August 1, 2005. The claimant participated in the hearing and presented testimony from two other witnesses, Megan Holtz and Laurie Soroka. Lucie Hengen of Employer's Unity appeared on the employer's behalf and presented testimony from two witnesses, Dave Gregory and Stephanie Rhodes. During the hearing, Employer's Exhibit One was entered into evidence. Based on the evidence, the arguments of the parties, and the law, 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?

FINDINGS OF FACT:

The claimant started working for the employer on February 14, 2004. He worked full time as a center sales and service associate trainee in the employer's Des Moines, Iowa, incoming call center. His last day of work was April 14, 2005. The employer suspended him that day and discharged him on May 4, 2005. The reason asserted for the discharge was making threatening statements to other employees.

The claimant was in a training class run in part by Ms. Rhodes, the corporate trainer, with a number of other associates, including Ms. Holtz and Ms. Soroka. On or about April 14, 2005, there was a situation in the class where Ms. Rhodes reprimanded the claimant for not paying attention and he gave her what she felt were threatening looks; he also had looked into the classroom after the class was over, which she felt was threatening. He then walked around the room, which Ms. Rhodes felt was done to intimidate her. After discussions with some other members of the class, the employer asserted that the claimant had made a statement to some other associates that he was "going to (or could) slit your throat," "I could kill you without a second thought," that he had been in the military and "if you had been in the military with me you would not have come out alive," "If I don't pass the 20 day assessment I won't go quietly," and "I can't wait until next Tuesday, when I turn 21 and can buy a gun."

The claimant denied most of these statements in their entirety, noting, for example, that he had never even been in the military. He acknowledged saying that he would dispute any decision that he had not passed the assessment, but only in the sense that he would follow any available appeal process, not in the context of threatening to take any physical action. He acknowledged that he had said he was looking forward to turning 21 and buying a gun, but asserted that this was part of a general casual discussion amongst some of the associates in the class who were discussing leisure interests, and one of the claimant's leisure interests was target shooting. The claimant admitted getting up and moving after being reprimanded, but indicated that it was primarily to move away from another associate who had been bothering him. The claimant's witnesses who were in the class substantiated the claimant's assertions as to what was said or done and the context in which they occurred.

The claimant established an unemployment insurance benefit year effective May 1, 2005.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue 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 questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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).

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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is the assertion that he had made threatening statements against other employees. However, the claimant denied making any threatening statements. Other than Ms. Rhodes, no first-hand witness was available at the hearing to provide testimony to the contrary under oath and subject to cross-examination. The employer relies primarily on the second-hand account from the other associates; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether the associates might have been mistaken or whether they are credible. Under the circumstances, the administrative law judge finds the claimant's first-hand information more credible. Ms. Rhodes did not hear the alleged comments herself; while she perceived a threat given the way the claimant was looking at her, there is no evidence of any attempt to act on any anger that the claimant might have been feeling against her. 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.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code section 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code section 96.19-3. The claimant's base period began January 1, 2004 and ended December 31, 2004. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

DECISION:

The representative's May 25, 2005 decision (reference 02) 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. The employer's account is not subject to charge in the current benefit year.

ld/tjc