**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**DENISE J PARSONS**
Claimant

**NEXT GENERATION WIRELESS INC**
Employer

**APPEAL NO: 08A-UI-01391-DT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 01/13/08 R: 04**
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Denise J. Parsons (claimant) appealed a representative's February 1, 2008 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Next Generation Wireless, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 10, 2008. The claimant participated in the hearing and was represented by Emilie Roth Richardson, attorney at law. John Wood, attorney at law, appeared on the employer's behalf and presented testimony from three witnesses, Bill Bradford, Heather Hamilton, and Lindsey Klosterman. One other witness, Kristi Eastman, was available on behalf of the employer but did not testify. 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 or about September 17, 2002. She worked full time as a retail sales consultant/associate in the employer's Dubuque, Iowa cellular service and product store. Her last day of work was January 9, 2008. The employer discharged her on that date. The reason asserted for the discharge was having continued unpleasant interactions with customers and coworkers.

Due to complaints received from the employer's cellular service provider from customers and from the service provider's representative that the claimant had behaved generally rudely toward them, the employer gave the claimant a written counseling on August 6, 2007. (Employer's Exhibit One, pages 14 through 18.) On September 26, 2007 the employer gave the claimant a final counseling due to customer complaints regarding perceived poor customer service received from the claimant. (Employer's Exhibit One, pages 12 and 13.)

On December 20, 2007 the claimant's area sales manager, Heather Hamilton, had a verbal discussion with the claimant regarding additional concerns. (Employer's Exhibit One, pages 8 and 9.) Those concerns included issues reported to the employer from the employer's service provider's account executive, including the executive's own observation of the claimant attempting to pressure another consultant/associate, Ms. Klosterman, into changing her work schedule, complaints by Ms. Klosterman to the account executive that the claimant had made comments that Ms. Klosterman would "do well with her sales" due to her good looks and that the claimant was not going to "lose her job to a pretty girl" like she had in the past, and complaints to the service provider by a customer asserting a non-professional discussion on the sales floor by the claimant. The claimant was also advised not to accuse other associates of taking her sales. The claimant denied these allegations at the time of the discussion; Ms. Hamilton reminded the claimant she was on final warning and that if there were repeats of these occurrences, it would lead to termination.

On December 29 the claimant came in for a later shift while Ms. Klosterman was still on duty. In reviewing the sales logs, the claimant discovered that a customer with whom she had talked the prior evening and who had made an appointment with the claimant to return later on the 29th had already come in and made his purchase with Ms. Klosterman. While a third consultant/associate was assisting a customer, the claimant made a comment to that effect to Ms. Klosterman, indicating she was disappointed that the customer had not come in as scheduled to make the sale with her, but indicated that she was going to stop there and not say any more. Ms. Klosterman became upset and later contacted Ms. Hamilton to advise her of the situation. She then documented the matter in an email to the employer's operations director on January 4, 2008. The employer then discharged the claimant on January 9.

**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).

Iowa Code § 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.

871 IAC 24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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 was that she had additional confrontational incidents with a coworker after being warned. Specifically, the employer discharged the claimant for the final incident on December 29 after the final reminder given to her on December 20. First, the specifics of what was said on December 29 are in dispute. When it made its decision, the employer was unclear as to what exactly was said, but took it as that the claimant had generally openly confronted Ms. Klosterman about "stealing" a customer and had again made statements about Ms. Klosterman getting sales because of being "good-

looking." When questioned at the hearing, Ms. Klosterman initially did not indicate the claimant had made a reference on December 29 to Ms. Klosterman getting sales due to being "good-looking," but when pressed for specifics modified her prior statement to assert that the claimant had in fact made such comments also on December 29 However, this is inconsistent with a direct reading of Ms. Klosterman's initial written report of the incident. (Employer's Exhibit One, page 1.)

In that report Ms. Klosterman begins with a recitation of prior problems with the claimant "ever since I have become commissionable" in about early December. That portion of the report contains the complaint about the claimant asserting that Ms. Klosterman would do well because of being "good-looking," that the claimant had complained about being pushed out of two other jobs by "good-looking" girls and was not going to let it happen again. After this recitation of past problems, Ms. Klosterman goes on to report that "on December 29th she had confronted me in front of a customer about selling to one of her customers, I explained to her that I was sorry and that they never asked for her. She simply said, 'Thanks A lot' (very sarcastically)." This more contemporaneous report of the actual December 29 incident indicates that on that occasion the claimant did not make comments about Ms. Klosterman getting sales due to being "good-looking" or that the claimant was going to fight losing her job to "another pretty girl." In fact, the contemporaneous report is more consistent with the claimant's own testimony that the exchange on December 29 was only a brief comment or two indicating disappointment but not making an accusation of "theft" of the customer, with no reference to anyone being "good-looking" or not losing a job to a "pretty girl." The brief exchange on December 29 was therefore not actually a repeat of what the claimant had been warned about on December 20, although under the circumstances of her December 20 warning the claimant would have been better advised to say nothing at all to Ms. Klosterman regarding the claimant's missed sale. Misconduct connotes volition. Huntoon, supra. From the information available, the administrative law judge cannot conclude that the incident on December 29 itself amounted to an intentional act of misconduct as compared to an exercise of poor judgment.

Further, even if misconduct could be found in the exchange on December 29, there is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). The incident in question occurred and the employer was aware of the occurrence over eleven days prior to the employer's discharge of the claimant without anything being said to the claimant during that period that action against her was pending. Therefore, while the employer may have had a good business reason for terminating the claimant's employment, it 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 February 1, 2008 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs