

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

CHANTEL E FRESE  
610 FLORENCE ST  
NORWAY IA 52318

ACCESS DIRECT TELEMARKETING INC  
c/o JOHNSON & ASSOCIATES  
NOW TALX UC EXPRESS  
PO BOX 6007  
OMAHA NE 68106-6007

Appeal Number: 04A-UI-06200-RT  
OC: 05-09-04 R: 03  
Claimant: Appellant (2)

**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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Chantel E. Frese, filed a timely appeal from an unemployment insurance decision dated May 26, 2004, reference 02, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on July 1, 2004 with the claimant participating. The employer, Access Direct Telemarketing, Inc., did not participate in the hearing because the employer's representative, Johnson and Associates, now known as TALX UC eXpress, informed the administrative law judge that the employer elected not to participate in the hearing. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

#### FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a part-time telephone sales representative (TSR) from October 3, 2002 until she was discharged on May 7, 2004. The claimant averaged 22½ hours per week. The claimant was discharged for pushing on a person who was pushing a chair into the claimant. On or about May 6, 2004, the claimant was "playing" with a laser pointer. All employees including supervisors had done so in the past and no one had said anything about it and this was not the reason given to the claimant for her discharge. She was demonstrating the distance of the laser pointer to a coworker when she moved it down and it shown on the shirt of a coworker, Tyrone. Tyrone did not seem mad. However, Tyrone came up behind the claimant who was standing by her desk and began pushing the chair into the back of the claimant. At first it was not hard and the claimant thought it was in fun. However, Tyrone began pushing the chair harder and harder against the claimant. He pushed the chair so hard against the claimant that her leg was bruised and her foot was cut. The claimant kept asking Tyrone to stop and Tyrone refused. The claimant became scared and put her right hand over her left shoulder and touched Tyrone in an effort to push him away. Tyrone then stopped pushing and as claimant was trying to extricate herself from the desk Tyrone slapped her face. The claimant did not use profanity or hit Tyrone. Nevertheless, the claimant was discharged for this activity because she was alleged to have participated in the fight by pushing on Tyrone. The claimant had received no warnings or disciplines previously.

#### REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was 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 administrative law judge concludes that the claimant was discharged on May 7, 2004. 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. 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 employer elected not to participate in the hearing and therefore did not provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of her duties and/or evincing a willful or wanton disregard of the employer's interests and/or in carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The claimant testified credibly that she was "playing" with a laser pointer when it shown on the shirt of a coworker, Tyrone. Although Tyrone did not seem mad about it, he came over and began pushing the claimant's chair against her as she stood up by her desk. He pushed harder and harder. Tyrone pushed so hard that the claimant's leg was bruised and her foot was cut. She kept asking him to stop and when he would not she put her right hand over her left shoulder and tried to push him away. This was the action that gave rise to the claimant's discharge. Tyrone then stopped pushing and as the claimant was trying to extricate herself from her desk he slapped her face. The claimant was discharged for pushing on Tyrone because the employer alleged that the claimant was participating in the fight. The administrative law judge must conclude that the claimant was really not participating in a fight but was merely trying to defend herself. The administrative law judge does not believe that employees should be "playing" with a laser pointer but, under the evidence here, all employees including supervisors had been doing it and no one was ever reprimanded for it and this was also not the reason given to the claimant for her discharge. The administrative law judge concludes that the claimant's pushing against Tyrone was not itself disqualifying misconduct.

Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct, and, as a consequence, she 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 her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

DECISION:

The representative's decision of May 26, 2004, reference 02, is reversed. The claimant, Chantel E. Frese, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct.

tjc/tjc