

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HALSEY R O'SHEA
Claimant

APPEAL NO. 07A-UI-04527-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ACCESS DIRECT TELEMARKETING INC
Employer

OC: 04/08/07 R: 04
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 24, 2007, reference 01, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on May 21, 2007. Claimant participated. Employer participated through Erik Rudd and Ronald Gomez and was represented by Marty Young of Johnson & Associates.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a part-time telephone sales representative (TSR) from July 31, 2006 until January 15, 2007 when she was discharged for failure to read sales scripts verbatim, not giving the customer a point of reference as to time, and not referring the call to a supervisor for verification on January 13, 2007. She snapped her fingers as instructed to call a supervisor but none was available. Rudd and Gomez were not present when claimant was fired and she was not given an opportunity to hear the final incident tape recording. Employer had issued warnings about the same issues at least twice each month during her employment and the longest period of time she went without an error was from November 11 through December 2, 2006. She had eight different supervisors and worked on at least five sales campaigns during the six months she worked there and tried to perform the work to the best of her ability. Warning dates were, in the order presented at hearing, December 21, 2006, December 2, 2006, November 11, 2006, October 31, 2006, October 24, 2006, October 9, 2006, October 18, 2006, October 13, 2006, September 24, 2006, September 1, 2006, August 31, 2006, December 18, 2006, August 28, 2006, September 25, 2006, August 14, 2006, August 10, 2006, and January 10, 2007.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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.

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).

Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. IDJS*, 386 N.W.2d 552 (Iowa App. 1986). Since employer agreed that claimant had never had a sustained period of time during which she performed her job duties to employer's satisfaction and inasmuch as she did attempt to perform the job to the best of her ability but was unable to meet the employer's expectations, no intentional misconduct has been established, as is the employer's burden of proof. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

DECISION:

The April 24, 2007, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/css