

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEBORAH BEARD
Claimant

APPEAL NO: 14A-UI-00256-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

CDS GLOBAL INC
Employer

OC: 12/08/13
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 31, 2013, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on January 30, 2014. The claimant participated in the hearing with Attorney Erik Luthens. Jill Murtaugh, Workforce Manager; Sue Grummert, Senior Manager of Customer Service; Chris Pope, Production Manager for Customer Service; and Rich Sheets, Calls Center Supervisor participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time customer service representative for CDS Global from August 17, 2009 to December 12, 2013. She was discharged for failing to meet the employer's customer service expectations.

On November 20, 2013, the claimant failed to follow the employer's standard procedure when handling a call from a subscriber who called back November 27, 2013, to complain. The employer listened to the call records from that call and determined the claimant did not perform her primary job functions. A donor's recipient called November 20, 2013, because she had not received her magazine issue for the month. The claimant did not show any empathy or concern, did not apologize, interrupted the customer, gave her false information and confused her, was rude and fought and argued with the caller without resolving her problem. The caller stated, "You have got a little bit of an attitude and you are mad at me for not getting my magazines and I'm getting mad now too. So if you don't want to send it, don't send it. I don't really care. I will tell the donor to cancel it because I don't like your attitude. You have taken a tone with me now and I'm trying to be nice to you. I will just tell the donor what you said and how you were and tell her to cancel it." The claimant responded, "Have a good day ma'am."

The donor called back to complain November 27, 2013, and said the recipient was very upset. The employer gathered the information surrounding the customer complaint and consulted with the corporate office in Des Moines, before terminating the claimant's employment December 12, 2013.

The claimant received a first and final written warning May 10, 2013, regarding a call that took place May 7, 2013. The claimant gave false information to the caller, argued with him and was rude to him. The customer wanted two plush toys to go with a two-year renewal. The claimant told the customer she was sending him a DVD but never entered it into the computer. Additionally, after finally seeking the help of her supervisor, who instructed her to give the customer the two toys, she did not follow her supervisor's instructions and consequently that customer was lost. The call lasted 12 minutes and 51 seconds and the employer estimated the call could have been handled in three minutes if the claimant had tried to satisfy the customer and simply given him what he asked for and was entitled to receive.

On May 24, 2013, the employer reissued the first and final written warning of May 10, 2013, to the claimant after the claimant cancelled a gift subscription May 21, 2013, when the customer had only called to ask that the renewal cards and letters stop. When the claimant realized the customer did not want to cancel the subscription she told the customer it was too late and she could not do anything about it. The customer called back and spoke to a supervisor who reinstated the subscription.

On May 23, 2013, a customer called to state she had not received some issues of the magazine. The claimant gave the impression she did not believe the customer and instead of extending her for all missed issues without question, she put her on a time limit to call back with information regarding which issues she was missing. The employer does not have a time limit policy. The warning told the claimant to "refrain from talking over a caller. Do not pass judgment or make decisions on if we do or do not owe the subscriber. Help the customer – that's why they're calling. Be positive and helpful to the customer! Ensure the customer is pleased or at least understands the situation before the conversation has ended. Do not just try to brush the customer off by making up your own rules or policies. When transferring a caller to a Supervisor for additional assistance, provide accurate and honest information about the call so they can handle appropriately" (Employer's Exhibit Two). The warning also noted the claimant's voice was angry and stated she would receive additional training (Employer's Exhibit Two). The warning ended by stating, "**Deb, as per your 1st & Final written notice issued on 5/10/13, your position at CDS Global is in serious jeopardy.**" The claimant signed the warning.

When the employer met with the claimant to notify her of the termination the claimant asserted the separation was in retaliation because she hired an attorney for her worker's compensation claim due to an incident that occurred August 23, 2013. The employer's witnesses stated they were unaware she had hired an attorney.

The claimant has claimed and received unemployment insurance benefits since her separation from this employer.

REASONINGS AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

As a customer service representative, the claimant's main duty was to satisfy the customer within the bounds of the employer's policies and procedures. She was the client's contact with its customers and consequently it was extremely important that she never be rude or dishonest when speaking to a customer. The claimant failed to meet that standard on three occasions between May 10, 2013 and November 20, 2013. She had been warned that her job was in jeopardy for the same behavior but failed to change her behavior toward customers, as evidenced by the November 20, 2013, call.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a

claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

871 IAC 24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if un rebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

The employer participated in the fact-finding interview by providing written documentation to the fact finder detailing each incident and demonstrating the claimant had been warned about her conduct. There was sufficient evidence to conclude the claimant's actions constituted disqualifying job misconduct.

DECISION:

The December 31, 2013, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant is overpaid benefits in the amount of \$1,650.00.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css