IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DANIELLE D DAY
Claimant

CONN COMMUNICATIONS INC
Employer

APPEAL NO. 10A-UI-03314-DT

ADMINISTRATIVE LAW JUDGE DECISION

Original Claim: 01/31/10
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Conn Communications, Inc. (employer) appealed a representative's February 25, 2010 decision (reference 02) that concluded Danielle D. Day (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 April 14, 2010. The claimant participated in the hearing. Stacey Hall appeared on the employer's behalf. During the hearing, Employer's Exhibits One and Two were 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:

After a prior period of employment with the employer through a temporary employment firm, the claimant started working directly for the employer on November 29, 2008. She worked full-time as a sales associate in the employer's Muscatine, Iowa, wireless communications store. Her last day of work was February 2, 2010. The employer discharged her on that date. The reason asserted for the discharge was an unwillingness to work her scheduled hours and being deemed out of line in the tone of her communications.

The claimant was scheduled to work about 32 hours per week, but particularly in December 2009 and January 2010 was actually only working about 25 hours per week. On January 19, 2010 Ms. Hall, the sales manager, reviewed with the claimant her productivity and attendance; she gave the claimant a written warning that specified that "if there is not great improvement in your productivity your employment will end . . . We will have another meeting on March 2 to review your progress." (Employer's Exhibit One.)

The claimant was then absent from work on January 20 and January 21 due to a winter storm. On January 22 and January 23 she was scheduled to work until 5:00 p.m. but left at 4:15 p.m. and 4:20 p.m., respectively. On January 27 she was scheduled to work until 5:00 p.m. but left

at 12:55 p.m. As a result, on January 27 Ms. Hall revised the work schedule for February. The claimant had previously been scheduled to work four or five days per week, at least 32 hours per week; after the revision, she was only scheduled to work about 28 hours per week.

On January 28 the claimant discovered the February schedule had been changed; she sent Ms. Hall an email expressing her concern:

> . . . [T]he February schedule of roughly only 28 hours a week . . . which will in turn cause my insurance to be dropped and still not provide me with enough to pay bills and [daycare;] this is not acceptable to me. I hired on for a full time position and the last week when Stacey, you and I had a meeting something we spoke about was me getting back my [Mondays] as I expressed to you how important it is that I keep my [insurance]. Not only did I not get those back, I have lost another 10 hours. I don't know if between this and my lack of sales is a way of trying to make me quit but I either need 32 or more scheduled hours to make a difference to try to increase my sales or to be let go so I can work for someone who is willing to do so. There are also times where I had clearly stated and have never been different where they are weeks and or days I have my son and can not work the 11-7s. Those days have never been any different. Please let me know what you plan on doing with this . . .

The same day, Ms. Hall responded, citing the fact that in January the claimant missed 41.5 hours of scheduled work: the first week she was scheduled for 24 hours and worked 13.46 hours; the second week she was scheduled for 39 hours and worked 29 hours; the third week she was scheduled for 32 hours and worked 15.35, and the fourth week she was scheduled for 39 hours but worked 34.10. She then responded to the claimant's assertions:

> Since our conversation Tuesday of last week, you have called in 2 days and left early 3 days. That is not acceptable to me. If there are other employees willing and able to work, they should get those hours. This is not a decrease in hours worked but a decrease in hours scheduled. In November you averaged 28 hours worked per week and in December 25 per week. Each day we will have one person open at 9 and 2 people come in from 11-7 to close. Availability and productivity will determine who is scheduled. If you are not willing to work the hours needed, those hours will be given to someone else. At this time there will be no changes to the [February] schedule.

Yet that day, the claimant made a further response:

> [I'm] perfectly aware of the schedule and the hours, but as gone over in our meeting with me having a staph infection in late November and early [December] and with the weather and days I and Liz Weber alike were TOLD not to come in due to overstaffing and slow business that was why. You had told me there was no reason that I couldn't have my [Mondays] back and indicated we would do that. The days "called in" after that were due to weather and not even having power. When living in a rural area and having well water not only were we without power it was water also on top of the fact it was not even an option to get out of our road I could not come to work. I called in followed procedures with John and lining up someone as early as 5:30 a.m. to make sure it was covered. All of those things aside I was hired full time with insurance after my start up period. I am a single mother with a 3 [year] old who depends on [that. If] you can no longer offer that to me then I feel the ethical thing to be done is to either stick to our verbal agreement of getting my 40 hours back with the intention of increasing sales etc or choosing different routes, or to let me go. I can not work the schedule you changed of mine as I can not

> work Wednesday until 7 when my son has to be picked up at daycare by 5pm. My schedule has never changed, so now with not only getting my hours cut they are replaced by ones that I have no way of scheduling around. If you can't work with me on that like you have for over a year now then please have the respect of ending my employment and not just out of the blue giving me an unrealistic schedule.

Concluding the claimant's tone in these emails was out of line and concluding that the claimant was not willing to work her scheduled hours, the employer determined to discharge the claimant, doing so on February 2.

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).

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is her lack of working her scheduled hours in the past, her expressed unwillingness to work under the February schedule as amended, and her general tone in the January 28 emails. While the employer had a good business reason for reducing the claimant's hours and discharging the claimant, the claimant also had a good reason for being unhappy about the change the employer had effected. There is nothing in the emails that is grossly or clearly inappropriate or unacceptable, or obviously insubordinate. Under the circumstances, the claimant's expression of concern about the hours she had lost was at worst was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good-faith error in judgment or discretion.

Misconduct connotes volition. Cosper, supra. When the claimant missed other work after January 19, she did not do so with knowledge or intent that this could immediately result in a reduction of her hours or lead to her termination; the warning she had been given indicated that the next review of her progress would be on March 2 – the mere fact that she missed additional work immediately after January 19 did not mean that the claimant could not have recovered and improved her productivity in February had she been allowed to continue working her regular schedule. Again, while the employer was within its prerogative to discharge the claimant, 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 25, 2010 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 she is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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