

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NICHOLAS S ATKINSON
Claimant

APPEAL NO: 10A-UI-07247-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ACCESS DIRECT TELEMARKETING INC
Employer

OC: 04/18/10
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Access Direct Telemarketing, Inc. (employer) appealed a representative's May 7, 2010 decision (reference 01) that concluded Nicholas S. Atkinson (claimant) 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 July 7, 2010. The claimant participated in the hearing. Judy Hopkins appeared on the employer's behalf. 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 September 24, 2008. He worked full time as a telesales representative in the employer's Ames, Iowa call center. His last day of work was April 9, 2010. The employer suspended him that day and discharged him on April 14, 2010. The reason asserted for the discharge was being rude and unprofessional on a call on April 9.

On April 9 the claimant made a call to a potential customer who had expressed some interest in a product offered by the employer's business client. When he reached the potential customer, she asked him to wait a few minutes while she spoke to someone else who was with her. When she came back on the phone, she told him that she was no longer interested. The claimant then began to "probe" for a reason as required by the employer's procedures. After the potential customer simply said several times that she had just changed her mind, he asked her if she "just randomly changed her mind," to which she said yes. The employer found this phrasing of the question to her to be rude and unprofessional.

The claimant proceeded to start to make the rebuttal responses required by the employer's procedure. As he did, the potential customer made a few statements, perhaps "Bye," perhaps "Have a nice day," to which the claimant did not respond; the employer found his failure to

acknowledge her statements to be rude and unprofessional. The claimant either did not hear all of the potential customer's attempted statements, or assumed she was speaking to whoever was in her vicinity, and not to him. She then said, "Hello, is there anyone on the line?" The claimant responded that there were just a few more things he needed to cover with her to finish the call, but she then hung up.

The claimant had not previously received any formal discipline. He had been given routine coachings and counselings regarding correct tone and avoiding rudeness, but nothing that indicated his job was in jeopardy should he fail to correct or address the problem. Rather, his supervisor had counseled him only about a week prior to April 9 that he was not being aggressive enough in his calls. Also about a week prior to April 9, the claimant had requested going to part-time status; the supervisor had responded that while the request might be granted, he would need to be firing him shortly.

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 which 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 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. 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 his alleged rude and unprofessional conduct in the call on April 9. Misconduct connotes volition. One way to establish intent is where an employee continues to repeat conduct for which he has been warned that he could be terminated. The claimant had not previously been warned that future problems with his tone or conduct on a call could result in termination. Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). While the claimant's handling of the April 9 call might not have been ideal, it was not so shockingly or blatantly rude or unprofessional as to establish a willful or wanton disregard of the employer's interest. Under the circumstances of this case, the

claimant's conduct 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. The employer 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 May 7, 2010 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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