

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**RICHARD JENKINS**  
Claimant

**APPEAL NO: 09A-UI-15764-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TRUGREEN LP**  
Employer

**OC: 07-19-09**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge/Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the October 13, 2009, 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 November 23, 2009. The claimant participated in the hearing. Nick May, Sales Manager and Tom Kuiper, Employer Representative, 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 residential sales representative for Trugreen from June 20, 2008 to March 14, 2009. The employer requires residential sales representatives to meet a weekly sales minimum of \$2,000.00. The claimant had missed that goal several times and received a verbal warning, a written warning (no dates provided) and a final written warning March 9, 2009, all for failure to meet his sales goals. When he received his final written warning Monday, March 9, 2009, he was told his employment would be terminated at the end of the week if he did not meet the minimum sales goal. The claimant knew his job was in jeopardy and when he went in Saturday, March 14, 2009, Sales Manager Nick May told him his employment was supposed to be terminated March 13, 2009, but Mr. May wanted to give him an extra day to meet his minimum. The claimant was unable to do so and his employment was terminated March 14, 2009. The parties agree the employer listened to some of the claimant's sales phone calls and tried to work with him to improve his performance but his numbers did not improve. The employer felt the minimum sales goals were reasonable because the rest of the sales group averaged \$5,000.00 per week. The claimant tried "everything (he) could" and the employer felt he was "trying hard" but he could not meet the employer's weekly sales minimums on a consistent basis.

## 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 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.

The claimant was effectively given the choice of quitting or facing termination and he chose termination. When an employee is told he will be discharged if he does not resign the separation is considered a termination. Consequently, this separation was a termination. The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000). Misconduct connotes volition. A failure in job performance which results from inability or incapacity is not volitional and therefore not misconduct. Huntoon v. Iowa Department of Job Services, 275 N.W.2d 445 (Iowa 1979). Inasmuch as the claimant did attempt to perform the job to the best of his 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 section 96.5-2-a is imposed. Benefits are allowed.

**DECISION:**

The October 13, 2009, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

je/css