

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ASHLEY M KELCHEN
Claimant

APPEAL NO. 09A-UI-18869-AT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NORTHWEST DIRECT OF IOWA INC
Employer

**Original Claim: 11/15/09
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Northwest Direct of Iowa, Inc. filed a timely appeal from an unemployment insurance decision dated December 8, 2009, reference 01, that allowed benefits to Ashley M. Kelchen. After due notice was issued, a telephone hearing was held January 8, 2010, with Ms. Kelchen participating. Controller Tanya Rote participated for the employer. The administrative law judge takes official notice of Agency benefit payment records.

ISSUE:

Was the claimant discharged for misconduct in connection with her employment?

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Ashley M. Kelchen was employed as a telephone sales representative by Northwest Direct of Iowa, Inc. from March 2, 2009, until she was discharged November 9, 2009. Prior to her official hire date, she had been working at the company for several months through a temporary employment services agency.

On November 7, 2009, Ms. Kelchen was overheard not following company procedures while speaking with customers. The company provides specific responses to be given to customers who initially indicate they are not interested in the goods or services being sold. Rather than follow through with these responses, Ms. Kelchen would discontinue to the call. Ms. Kelchen had received a verbal warning on October 28, 2009, for this same issue.

Ms. Kelchen has received unemployment insurance benefits since filing a claim effective November 15, 2009.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence establishes that the claimant was discharged for misconduct in connection with her employment. It does.

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 employer has the burden of proof. See Iowa Code section 96.6-2. Ms. Rote testified that she herself had listened to the calls in which Ms. Kelchen failed to follow appropriate procedures. In light of this, Ms. Rote's testimony that the claimant's supervisors and trainer had expressed concerns about her performance is more credible than the claimant's testimony to the contrary. The administrative law judge concludes that the employer has established that the claimant was discharged for failing to follow appropriate procedures. Benefits are withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment

compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The question of whether the claimant must repay unemployment insurance benefits she has already received is remanded to the Unemployment Insurance Services Division.

DECISION:

The unemployment insurance decision dated December 8, 2009, reference 01, is reversed. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The question of repayment of benefits is remanded to the Unemployment Insurance Services Division.

Dan Anderson
Administrative Law Judge

Decision Dated and Mailed

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