

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JENNIFER M JOHNSON
Claimant

APPEAL NO. 10A-UI-11923-S2

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE CBE GROUP INC
Employer

OC: 07/04/10
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Jennifer Johnson (claimant) appealed a representative's August 16, 2010 decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits because she was discharged from work with The CBE Group (employer) for violation of a known company rule. After hearing notices were mailed to the parties' last-known addresses of record, a hearing was scheduled for September 28, 2010, in Des Moines, Iowa. The claimant was represented by Jamie Deremiah, Attorney at Law, and participated personally. The employer participated by Harley Wilson, Director.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on May 21, 2007, as a full-time collector. The employer's handbook was available to workers online. It was commonly known that the employer would not terminate an employee unless it had issued three warnings within a six-month period. The employer issued the claimant verbal warnings on January 20, 26, 29, and February 22, 2010, for failure to follow instructions. On April 22, 2010, the employer issued the claimant a written warning for failure to properly report an absence. The claimant was at work on time but the hand reader was not functioning properly. It did not recognize her when she signed in. The employer notified the claimant that further infractions could result in termination from employment.

On or about June 15, 2010, the employer moved the claimant without notice from the manual dialing department to the auto dialing department. The move was unwanted by the claimant. She told her long-term mentor and friend, Harley Wilson, that their relationship would continue to be professional but she would no longer confide in him about her personal life. After this, Mr. Wilson criticized the claimant almost every day.

On July 2, 2010, the computer dialed a number for the claimant and she asked the consumer to verify her personal information. The consumer asked the claimant not to call her at work. The claimant should have taken the telephone number out of the computer but the claimant forgot. On July 6, 2010, the computer dialed the consumer again. The consumer reminded the claimant about the previous call and asked to speak to the supervisor. The claimant tried to verify the consumer's identity while the consumer yelled profanity at her. The claimant transferred the call to Mr. Wilson.

On July 6, 2010, Mr. Wilson issued the claimant a written warning for inappropriate behavior during the calls. After issuing the warning, Mr. Wilson terminated the claimant. The claimant thought she was terminated because Mr. Wilson was upset with her personally.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged for 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.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of

Public Safety, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present a recording or transcript of the telephone conversations of July 2 and 6, 2010. The employer did not provide this at the hearing and, therefore, did not provide sufficient evidence of job-related misconduct to rebut the claimant's denial of said conduct.

An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. Inasmuch as employer had only issued two written warnings prior to separation, it has not followed its own rules and guidelines. The claimant had no understanding that the second written warning would result in her termination from employment. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's August 16, 2010 decision (reference 01) is reversed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/kjw