

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TRACY L TUCKER
Claimant

APPEAL NO. 15A-UI-10258-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

EGS CUSTOMER CARE INC
Employer

OC: 08/02/15
Claimant: Appellant (2)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Claimant filed a timely appeal from a representative's decision dated September 8, 2015, reference 01, which denied unemployment insurance benefits finding that the claimant was discharged from work for violation of a known company rule. After due notice was provided, a telephone hearing was held on September 29, 2015. Claimant participated. The employer participated by Ms. Tammy Mason, Human Resource Generalist.

ISSUE:

The issue is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Tracy Tucker was employed by EGS Customer Care, Inc. from January 14, 2013 until August 4, 2015 when she was discharged from employment. Ms. Tucker was employed as a full-time telephone customer service representative and was paid by the hour.

Ms. Tucker was discharged on August 4, 2015 after a company client requested that Ms. Tucker be removed from the client's sales program with EGS Customer Care, Inc. A customer of the client had complained to the client that Ms. Tucker had been rude during a telephone call and after reviewing the call, the client requested that Ms. Tucker be removed from their sales program. Because Ms. Tucker had received a warning from EGS Customer Care, Inc. on December 27, 2014, a decision was made to terminate Ms. Tucker from her employment.

During the final call that had caused Ms. Tucker's discharge, the claimant had attempted to obtain HIPAA information from a third person who had joined the call. When the third party had requested to speak to a supervisor, Ms. Tucker had immediately thanked the caller and transferred him to a supervisor without further comment. Ms. Tucker believed that she was following company policy that requires customer service representatives to immediately transfer a caller to a supervisor, if the request is made. Although the claimant had correctly followed the

transferring of a call to a supervisor policy, the client believed that Ms. Tucker should have listened further to the caller before transferring.

It was Ms. Tucker's belief that she was following the procedures as she understood, based upon her training in the company. The company's handbook does not supply specific information on transferring call issues and Ms. Tucker maintains that she had not been provided a copy of the company handbook although she had acknowledged its receipt.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes intentional misconduct sufficient to warrant the denial of unemployment insurance benefits. It does not.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

In discharge cases the employer has the burden of proof to establish disqualifying conduct of the part of a claimant. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the

denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based on a current act. See 871 IAC 24.32(8).

Allegations of misconduct without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In the case at hand, the claimant participated personally and provided firsthand, sworn testimony denying that she had intentionally violated the company's call handling policies. In contrast, the employer relies upon hearsay testimony regarding the claimant's conduct during a call where the claimant had been requested to transfer the call to a supervisor. While hearsay is admissible in administrative proceedings, it cannot be accorded the same weight as firsthand, sworn testimony, provided that the firsthand testimony is credible and not inherently improbable. The employer's witness had not listened to the call and was not familiar with the call or what had taken place during the call. The claimant testified that she was not rude to the caller and that she believed that she was following the correct procedure by thanking the caller and transferring the caller to a supervisor when requested to do so.

The question before the administrative law judge in this case is not whether the employer has a right to discharge an employee for this reason, but whether the discharge is disqualifying under the provisions of the Employment Security Law. While the employer's decision to terminate Ms. Tucker may have been a sound decision from a management viewpoint, the evidence in the record is not sufficient to establish intentional misconduct on the part of Ms. Tucker that would disqualify her for unemployment insurance benefits. Benefits are allowed, providing the claimant is otherwise eligible.

DECISION:

The representative's decision dated September 8, 2015, reference 01, is reversed. Claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs