

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

LISA J RIDER  
1707 S 7<sup>TH</sup> AVE APT A10  
MARSHALLTOWN IA 50158

ACCESS DIRECT TELEMARKETING INC  
c/o JOHNSON & ASSOCIATES  
PO BOX 6007  
OMAHA NE 68106-0007

Appeal Number: 04A-UI-09257-S2T  
OC: 08/01/04 R: 02  
Claimant: Appellant (2)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Lisa Rider (claimant) appealed a representative's August 19, 2004 decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits because she was discharged from work with Access Direct Telemarketing (employer) for violation of a known company rule. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 23, 2004. The claimant participated personally. The employer was represented by Suzanna Ettrich, Staff Attorney, and participated by Nate Bradbury, Program Manager; and Travis Vaughn, Quality Assurance Representative.

#### FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on May 17, 2004, as a full-time telephone sales representative. The claimant received a copy of the employer's handbook and signed for its receipt on May 25, 2004. The employer sent a memo to employee's and a meeting about the employer's zero-tolerance policy regarding profanity in May or June 2004. The claimant does not recall the memo or the meeting but she understood the employer's policy. The claimant had never been issued a warning regarding inappropriate language.

On July 28, 2004, the employer issued the claimant a warning because there was too much noise in her area. Two supervisors were wrestling behind her and making a lot of noise. On July 29, 2004, a representative spoke to the claimant about using her mute button and the noise level. The claimant expressed her feelings about getting a warning because her supervisors were acting inappropriately. She said that it was "bullshit". The employer terminated the claimant for using profanity.

#### REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes she was not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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). Foul language of itself can constitute disqualifying job misconduct. Warrell v. Iowa Department of Job Service, 356 N.W.2d 587 (Iowa App. 1984). Repeated failure to follow an employer's instructions in the performance of duties is misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). The employer discharged the claimant and has the burden of proof to show misconduct. The employer did not provide any evidence of repeated failure to follow instructions or repeated use of foul language at the hearing. Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). While the claimant's one incident of saying "bullshit" may be serious enough to warrant her termination, it is not serious enough to deny unemployment insurance benefits. Consequently the employer did not meet its burden of proof to show misconduct. Benefits are allowed.

#### DECISION:

The representative's August 19, 2004 decision (reference 01) is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

bas/tjc