

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID R MANTERNACH
Claimant

APPEAL NO. 11A-UI-16022-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

WS LIVE LLC
Employer

OC: 12/07/11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated December 7, 2011, reference 01, which held the claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on January 19, 2012. The claimant participated. The employer participated by Jenni Bauer, human resources generalist, and Jennifer Nadermann, supervisor. The record was held open following the hearing after the administrative law judge requested a copy of the disputed call between the claimant and a customer. On January 20, 2012, the employer sent the administrative law judge an email, with a copy to the claimant, stating that the call could not be provided "based on the nature of the program related to identity theft protection." The record was closed on January 23, 2012, when the administrative law judge read the email. The record consists of the testimony of Jenni Bauer; the testimony of Jennifer Nadermann; and the testimony of David Manternach.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a telecommunication center with a call center environment. The claimant was hired on March 28, 2011, as a customer service representative. The claimant handled inbound customer service calls for a program called "Life Lock", which is an identity theft protection program. The claimant's last day of work was October 8, 2011. He was terminated on October 8, 2011.

The incident that led to the claimant's termination occurred on October 1, 2011. A customer called in requesting an upgrade. She did not have a personal email and did not know her daughter's email. The claimant entered a phony email address so that he could complete the upgrade for her. He then asked her to call him when she got her daughter's email address. He

gave the customer his personal cell phone number so that he could make the change. The customer called the claimant and he changed the email on the system after her call.

The employer discovered the call on October 5, 2011. The claimant's efficiency was down that day, which meant that he was taking fewer calls that he should have taken. His supervisor, Jennifer Nadermann, heard the call and had concerns. She felt that the claimant should not have entered a phony email and should not have given his personal cell phone number to the customer, since the program in question concerned identity theft. The claimant was allowed to work on October 5, 2011, and for part of the day on October 8, 2011. He was then terminated.

The claimant had not been disciplined in the past for any reason by the employer.

REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. 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 on such past act or acts. The termination of employment must be based on a current act.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. The legal definition of misconduct excludes errors of judgment or discretion in isolated situations. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W. 2d 659 (Iowa App. 1988) The employer has the burden of proof to show misconduct.

There is insufficient evidence in this record to show that the claimant was discharged for misconduct. The employer contends that the claimant was terminated because he entered a phony email address into a system called "Life Lock" and then asked the customer to call back on his personal cell phone with the correct email address. This procedure was done because the customer did not have her own email address and needed to get her daughter's email address. The claimant did not believe that what he was doing was wrong and, in fact, he said this was done routinely. He felt he was providing good customer service. The employer felt that the errors were particularly egregious because the claimant was providing service on an identity theft protection program.

The employer never did satisfactorily explain what the claimant's wrongful motives were, other than the possibility of some financial incentive. The parties disagreed on whether the claimant knew what he was doing was wrong. Supposedly during the call, the claimant said that he hoped the call was not being monitored and that he was tricking the system when he entered the phony email address. The claimant denied having said this. The administrative law judge asked to listen to the recording of the call. The employer has declined to provide the call due to the nature of the program.

At best, the evidence shows that the claimant made an error of judgment or discretion on how he handled the call. No written policy was violated, at least none that was provided to the administrative law judge. There were no previous instances of discipline for any reason. The administrative law judge concludes that the employer has failed to show that the claimant was discharged for disqualifying misconduct. Benefits are therefore allowed, if the claimant is otherwise eligible.

DECISION:

The representative's decision dated December 7, 2011, reference 01, is reversed. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw