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

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ACCESS DIRECT TELEMARKETING INC
C/O JOHNSON & ASSOCIATES
PO BOX 6007
OMAHA NE 68106-6007

Appeal Number: 04A-UI-11620-SWT
OC: 09/26/04 R: 03
Claimant: Respondent (1)

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, 4th 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.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated October 18, 2004, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on November 23, 2004. The parties were properly notified about the hearing. The claimant participated in the hearing. Lynn Corbeil participated in the hearing on behalf of the employer with witness, Shingai Gurira. Exhibits 1 through 11 were admitted into evidence at the hearing.

FINDINGS OF FACT:

The claimant worked full time as a telephone service representative for the employer from October 1, 2001, to September 27, 2004. Mike Matejka was the claimant's supervisor. The claimant received written warnings for not reading the confirmation script verbatim on May 17 and June 25, 2004. She received a written warning on June 29, 2004, for pausing while

speaking to a customer and for not responding with two rebuttals after the customer had expressed that he was not interested. She was given a final written warning for waiting too long to take a new call on July 6, 2004.

In early August 2004, the claimant had started a sales program with a new customer, First USA, which required learning a new script. On August 6 and 23, 2004, the claimant forgot to state her name once each day when giving her opening statement to the customer and did not read the closing statement word for word. She was warned about this on August 9 and 23.

In two states, the law prohibits a representative from offering rebuttal when a customer states they are not interested. Under the employer's policy, the representative is supposed to terminate such a call immediately and give the customer a courtesy closing statement. The claimant had never been required to call "no rebuttal" states when she was working on other sales programs. During one of the approximately 500 calls she made on September 23, 2004, she mistakenly offered a response to a customer who had said he was not interested. The claimant did not deliberately provide rebuttal to the customer with the knowledge that the customer was from a "no rebuttal" state.

The call on September 23, 2004, was monitored and a compliance alert was issued. On September 27, 2004, the employer discharged the claimant for unsatisfactory performance in providing rebuttal to a customer in a "no rebuttal" state.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance 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, (8) provide:

> 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).

> (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.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established in this case. No current act of willful and substantial misconduct has been proven in this case. The claimant was unaware that the customer was in “no rebuttal state” on September 23, 2004.

DECISION:

The unemployment insurance decision dated October 18, 2004, reference 01, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

saw/tjc