

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

RACHELLE L DICKINSON
4019 – 22ND AVE SW APT 4
CEDAR RAPIDS IA 52404

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

Appeal Number: 05A-UI-00671-JTT
OC: 12/12/04 R: 03
Claimant: Appellant (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 for Misconduct

STATEMENT OF THE CASE:

Rachelle Dickinson filed a timely appeal from the January 6, 2005, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on February 3, 2005. Ms. Dickinson did participate. Access Direct was represented by Dawn Fox of Johnson & Associates, with witnesses Brian Branscomb, Program Manager; Jeremy Goforth, Operations Supervisor, and Joel Erger, Operations Supervisor.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Rachelle Dickinson was employed by Access Direct as a full-time telephone sales representative (TSR) from October 14, 2003 until December 14, 2004, when Brian Branscomb, discharged her for misconduct.

The last incident that prompted Mr. Branscomb to discharge Ms. Dickinson occurred on December 13, when Ms. Dickinson was involved in a physical altercation with her twin sister, who was also employed at Access Direct. The sisters worked directly across from one another with 10 to 12 other employees in their immediate proximity. A verbal dispute arose between the sisters over whether their mother was going to pick them up after work. The verbal dispute continued as the sisters and others continued their telephone sales calls. Ms. Dickinson then escalated the dispute by walking over to her sister and forcibly grabbing her sister's arm. Ms. Dickinson grabbed her sister's arm with sufficient force to shake her sister's body and to cause Ms. Dickinson to be concerned about the extent to which she had harmed her sister.

Operations Supervisor Jeremy Goforth noticed the confrontation in time to observe Ms. Dickinson's sister being physically shaken by Ms. Dickinson and Ms. Dickinson walking away from her sister's work area back to her own. Mr. Goforth had to step between the women in an attempt to prevent further violence. Ms. Dickinson's sister subsequently hit Ms. Dickinson in the head. Mr. Goforth escorted both women to an office area and telephoned Mr. Branscomb.

Mr. Branscomb returned to the workplace and spoke with the sisters. Ms. Dickinson admitted to Mr. Branscomb that she had been in a verbal dispute with her sister and that she had grabbed her sister's arm. Mr. Branscomb instructed both women to telephone him prior to the scheduled start of their shift the next day for information regarding their further employment. Mr. Branscomb then sent both women home. Mr. Branscomb consulted with the employer's human resources department and the vice president for operations. The decision was made to discharge the women for violating the company's policy against violence in the workplace. The next morning, Mr. Branscomb advised Ms. Dickinson she was being discharged and the reason for the discharge.

Joel Erger had been Ms. Dickinson's immediate supervisor until approximately three months before her discharge. Mr. Erger had counseled Ms. Dickinson and her sister on multiple occasions as a result of heated verbal disputes at the workplace. Mr. Erger would be forced to step in as a result of the sisters' yelling, which could be heard 20 feet away and disrupted the workplace. Mr. Erger had on repeated occasions attempted to diffuse the hostility between the sisters and counseled the women to leave their personal disputes outside the workplace. Ms. Dickinson and her sister had on multiple occasions escalated their workplace disputes to physical acts against one another—however, management was apparently unaware of this.

Access Direct's policy against violence in the workplace is contained in the employee handbook under the heading of "Employee Conduct and Work Rules." Under the policy, an employee is subject to disciplinary action, up to and including termination of employment for "fighting or threatening violence in the workplace. A related policy subjects employees to similar discipline for "boisterous or disruptive activity in the workplace." Ms. Dickinson received a copy of the handbook and was aware of the policy throughout her employment at Access Direct.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Dickinson was discharged for misconduct in connection with her employment. It does.

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).

Since Ms. Dickinson was discharged, the employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment 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. App. 1992).

An employee who engages in a physical altercation in the workplace, regardless of whether the employee struck the first blow, engages in misconduct where the employee's actions are not in self-defense or the employee failed to retreat from the physical altercation. See Savage v. Employment Appeal Board, 529 N.W.2d 640 (Iowa App. 1995).

The evidence in the record as set forth in the Findings of Fact clearly establishes that Ms. Dickinson engaged in a physical altercation at the workplace on December 13, 2004. Ms. Dickinson was the first to turn the verbal dispute with her sister into a physical altercation. Ms. Dickinson had to get up from her own workstation and walk around the work area to

instigate the violence. Ms. Dickinson's actions were not in self-defense and at no time did Ms. Dickinson attempt to retreat from the dispute. Ms. Dickinson was fully aware of the policy against violence in the workplace and that such conduct could lead to discharge. Ms. Dickinson made the error of concluding that violence against her sister was not covered by the policy and that the employer did not mean what it clearly set forth at page 25 of the employee handbook. The record establishes that Ms. Dickinson engaged in misconduct on December 13 that justified her termination and disqualified her from receiving unemployment insurance benefits in connection with her separation from Access Direct.

DECISION:

The Agency representative's decision dated January 6, 2005, reference 02, is affirmed. The claimant is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

jt/pjs