

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

TSHANTA L SPENCER
1933 KING AVE
DES MOINES IA 50320-1231

COMMUNICATIONS DATA SERVICE INC
ATTN: HUMAN RESOURCES
PO BOX 671
DES MOINES IA 50303

Appeal Number: 06A-UI-05497-DT
OC: 04/30/06 R: 02
Claimant: Respondent (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, 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:

Communications Data Service, Inc. (employer) appealed a representative's May 22, 2006 decision (reference 01) that concluded Tshanta L. Spencer (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 13, 2006. The claimant participated in the hearing. Linda Carter-Lewis appeared on the employer's behalf and presented testimony from two other witnesses, Brandon Leek and Kelly Cool. During the hearing, Employer's Exhibits One through Five were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on October 4, 2005. After working part time (approximately 30 hours per week) in the same position until about mid-December 2005, she worked full time as a customer service representative (CSR) in the employer's magazine and product fulfillment and distribution inbound call center. Her last day of work was May 1, 2006. The employer discharged her on that date. The stated reason for the discharge was failing to follow instructions to perform work as required despite previously demonstrating an ability to do so.

Some of the employer's business clients participate in a special marketing program referred to as "SMART." Under that program, special additional marketing offers can be made to customers who call regarding one of those business clients' products. As a performance standard, CSRs are to make the product offer to at least 40 percent of callers of those business clients; there is no performance standard for the percentage of acceptance of the offer by the callers. The claimant met and exceeded that goal in her first six months of employment and in her second six months of employment.

The first indication of a problem in meeting the 40 percent standard occurred the weeks ending December 30, 2005 and January 6, 2006; the claimant was therefore issued a documented verbal warning on January 10, 2006. Her manager, Ms. Cool, demonstrated to the claimant how she could track her percentages on a daily basis to ensure that she was performing within expectations. However, the claimant again failed to meet the expectation for the weeks ending January 27 and February 3, 2006; as a result, the claimant was issued a first written warning on February 14, 2006.

The claimant again failed to meet the 40 percent expectation for the weeks ending March 3 and March 10, 2006. On March 14, 2006, the claimant was given a second and final warning that advised her that "your job is now in serious and immediate jeopardy. . . additional weeks of not meeting expectations of failing to meet expectations every other week . . . may result in further corrective actions being issued up to and including termination." The claimant met the expectation, ranging between 43 percent and 47 percent, for the five weeks ending March 17 through April 14, 2006. However, for the week ending April 21, of the 148 SMART calls the claimant handled, she only made the offer on 35.1 percent, and for the week ending April 28, of the 200 SMART calls the claimant handled, she only made the offer on 36.6 percent.

The claimant asserted that she found it more difficult than usual to make the offer to persons who were calling in already upset with a complaint they had with their prior order because of an internal billing error recently made on behalf of one of the participating business clients; however, she did not demonstrate how that circumstance was substantively different from the level of caller disgruntlement which normally pervaded the calls received, as virtually all callers were calling due to a complaint.

The claimant established a claim for unemployment insurance benefits effective April 30, 2006. The claimant has received unemployment insurance benefits after the separation from employment in the amount of \$863.00.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct. The issue is not whether the employer was right or even had any other choice but to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

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 claimant had previously demonstrated the ability to meet and exceed the employer's performance expectation on making the SMART offers, and then had shown she could improve

temporarily after being warned. Sellers v. Employment Appeal Board, 531 N.W.2d 645 (Iowa App. 1995). Despite knowing that her job was in jeopardy, the claimant imposed her own judgment not to make the additional offers to callers to avoid conflict; this shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's May 22, 2006 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of May 1, 2006. This disqualification continues until the claimant has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged. The claimant is overpaid benefits in the amount of \$863.00.

ld/kkf