

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LORIS M SCHRADER
Claimant

APPEAL NO. 07A-UI-09051-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ACCESS DIRECT TELEMARKETING INC
Employer

**OC: 07/30/06 R: 03
Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant filed an appeal from the April 11, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing on the timeliness issue was held by telephone conference call on October 9, 2007 and concluded with evidence on the separation issue on October 23, 2007. Claimant participated and was represented by Gary McClintock, Attorney at Law. Employer participated through Yvonne Podhajsky and was represented by Josh Burrows of Johnson & Associates. Department's Exhibit D-1 was received. Employer's Exhibit 1 was received.

ISSUE:

The issue is whether claimant's appeal is timely, and if so, whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: A disqualification decision was mailed to the claimant's address of record on April 11, 2007. The claimant did not receive the decision. The first notice of disqualification was the September 9, 2007 claim year prior adjudication decision of September 19, 2007. The appeal was sent within four days after receipt of that decision.

Claimant was employed as a full-time telephone sales representative (TSR) from May 31, 2005 until March 21, 2007, when she was discharged. She went through training for Citibank in January 2007 and she tried to work it for a week but could not figure out the multiple screens and asked to be put back on the other account. She worked at her original assignment again for a couple of weeks and it closed, so she was placed back on the Citibank account. When she said she was not able to perform the Citibank duties because the screens are more complex, her supervisor told her either she worked the Citibank account "or you are out the door." On March 20 claimant was observed by quality assurance giving inaccurate information to a customer. She had prior warnings about similar issues on twelve occasions: January 17,

24, 29, 30, 31; February 5, 6, 8, 27, 28; and March 5, 2007. She had not received this frequency and type of warning on prior accounts (Wells Fargo, etc.) that had fewer screens.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the claimant's appeal is timely. The administrative law judge determines it is.

Iowa Code § 96.6-2 provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant did not have an opportunity to appeal the fact-finder's decision because the decision was not received. Without notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Employment Security Commission*, 212 N.W.2d 471, 472 (Iowa 1973). The claimant timely appealed the next benefit year prior adjudication decision on the same separation, which was the first notice of disqualification. Therefore, the appeal shall be accepted as timely.

The remaining issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits. The administrative law judge concludes that she was not.

Iowa Code § 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.

Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. IDJS*, 386 N.W.2d 552 (Iowa App. 1986). Since claimant was unable to figure out the multiple and more complex screens on the Citibank account, there is no evidence she intentionally provided misinformation to customers; she never had a sustained period of time during the Citibank account assignment when she performed her job duties to employer's satisfaction and inasmuch as she did attempt to perform the job to the best of her ability but was unable to meet the employer's expectations, no intentional misconduct has been established, as is the employer's burden of proof. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

DECISION:

The April 11, 2007, reference 01, decision is reversed. The claimant's appeal is timely. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/kjw