IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JILL L O'MALLEY
Claimant

WS LIVE
Employer

APPEAL NO. 11A-UI-13489-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/28/11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Jill O'Malley (claimant) appealed a representative's October 3, 2011 decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits because she was discharged from work with WS Live (employer) for violation of a known company rule. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for November 4, 2011. The claimant participated personally. The employer participated by Jenni Bauer, Human Resources Generalist; and Kim Hundrieser, Supervisor.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on September 10, 2007, as a full-time customer service representative. The claimant signed for receipt of the employer's handbook on September 10, 2007. The employer's cell phone policy was updated and the claimant signed for receipt of that update on October 26, 2010. The policy indicated that no cell phones were allowed at the workstation. The employer let workers know that so long as cell phones were not heard or seen, there would be no problem with having them at the workstation. The handbook indicates that an employee would receive a verbal warning and a written warning before termination would take place.

A supervisor told the employer that she issued the claimant a verbal warning on February 24, 2011, but the claimant never received it. The employer issued the claimant a written warning for texting at her workstation on April 20, 2011. The claimant wrote on the warning that she did not text.

On September 1, 2011, the supervisor told the employer that the claimant was on her cell phone at her workstation. The claimant was not. The employer terminated the claimant for violation of the cell phone policy.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony but chose not to do so. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's October 3, 2011 decision (reference 01) is reversed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/css