

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MISTY J SCHWARTE
Claimant

APPEAL NO: 14A-UI-04643-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TM1 STOP LLC
Employer

OC: 09/15/13
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

TM1 Stop, L.L.C. (employer) appealed a representative's April 28, 2014 (reference 02) decision that concluded Misty J. Schwarte (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 July 30, 2014. The claimant participated in the hearing. Lindsey Sinn appeared on the employer's behalf. 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?

OUTCOME:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on November 4, 2013. She worked full time as a telephone account manager in the employer's Dakota Dunes, South Dakota call center. Her last day of work was April 7, 2014. The employer discharged her on that date. The reason asserted for the discharge was a concern that she had committed some additional violation of policy on that date.

The claimant had received several prior warnings for issues such as customer complaints or failing to read required statements during calls. The employer provided second-hand but internally conflicting statements, that the final incident which triggered the discharge decision was either an instance of call avoidance on April 7 and/or an additional instance of failing to read the required statement on April 7. The claimant's first-hand testimony was that on April 7 the Center Manager had told her that a Regional Supervisor had listened to a call which could

have been a hang-up by the claimant on a customer, but that even though listening to the call this was not clear and he had no choice but to discharge her. The claimant requested to listen to the call but was not allowed to do so. The claimant denied hanging up on a customer or again failing to read the required statement on April 7.

REASONING AND CONCLUSIONS OF LAW:

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). The question is not whether the employer was right 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 matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is she allegedly either hung up on a customer or failed to read a required statement during a call on April 7 after prior warnings. The employer relies exclusively on the second-hand account from the claimant's supervisor, who was not even the person who handled the actual discharge. However, without information being provided first-hand, the administrative law judge is unable to ascertain whether the supervisor might have been mistaken, whether she is credible, or whether the employer's witness might have misinterpreted or misunderstood aspects of the reports. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant committed misconduct on April 7. Even if the claimant had failed to handle calls properly in the past, there is no evidence of a current act of misconduct as required to establish work-connected misconduct. Rule 871 IAC 24.32(8); *Greene v. Employment Appeal Board*, 426 N.W.2d 659 (Iowa App. 1988). The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

As the employment was entirely outside the state of Iowa, the employer's chargeability for any benefits paid in any new benefit year and base period would be determined by the state in which those wage credits were accrued.

DECISION:

The representative's April 28, 2014 (reference 02) decision is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/can