

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**VANESSA TERC**

Claimant

**APPEAL NO: 10A-UI-00102-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ACCESS DIRECT TELEMARKETING INC**

Employer

**OC: 11-15-09**

**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge/Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the December 23, 2009, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on February 15, 2010. The claimant participated in the hearing. Judy Hopkins, Human Resources Manager, participated in the hearing on behalf of the employer.

**ISSUE:**

The issue is whether the employer discharged the claimant for work-connected misconduct.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time telephone sales representative for Access Direct Telemarketing from March 10, 2008 to November 19, 2009. She was discharged for failing to meet the employer's performance goals for a client. The claimant started working on the National Rifle Association account in the fall of 2009. She was required to sell \$38.00 worth of memberships to former members. Employees earned more if they sold by credit card rather than bill. The claimant was placed on a 30-day performance action plan November 5, 2009, and told she needed to bring her average to \$19.07 per hour and the employer indicated it wanted to see progressive improvement. She was evaluated November 13, 2009, and her revenue had improved to \$8.66 but because she had not yet met the goal of \$19.07 per hour she was instructed to sign another coaching form and was required to go to the office every day for a review of her sales each day. The employer reminded her she needed to improve to \$19.07 per hour. On November 19, 2009, the employer terminated the claimant's employment for failure to show the proper improvement. The employer did not give the claimant 30 days to show the required improvement because the client decides which employees should be removed for not performing to expectations regardless of the 30-day performance action plan.

## REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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 proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000). While the claimant did not meet the \$38.00 per hour goal set by the NRA, she was placed on a 30-day performance action plan November 5, 2009, and her employment was terminated two weeks later, half the time she was to be allowed to show improvement. The claimant had brought her numbers up somewhat but was not given the full amount of time to meet the sales goals. If the employer does not intend to honor the 30-day timetable it should not tell the employee that is how long she has to improve her numbers. Misconduct connotes volition. A failure in job performance which results from inability or incapacity is not volitional and therefore not misconduct. Huntoon v. Iowa Department of Job Services, 275 N.W.2d 445 (Iowa 1979). Under these circumstances the administrative law judge concludes the claimant's lack of performance on this account does

not rise to the level of intentional disqualifying job misconduct as defined by Iowa law. Therefore, benefits are allowed.

**DECISION:**

The December 23, 2009, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

je/pjs