IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TRAVISTEIN B LEWIS
Claimant

TM1 STOP LLC
Employer

APPEAL NO: 12A-UI-10534-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/15/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Travistein B. Lewis (claimant) appealed a representative's August 27, 2012 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with TM1 Stop, L.L.C. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 26, 2012. The claimant participated in the hearing and presented testimony from one other witness, Nakita Wells. Holly Ralston appeared on the employer's behalf. One other witness, Jim Hunter, was available on behalf of the employer but did not testify. Based on the evidence, the arguments of the parties, a review of the law, and assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, 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:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on November 28, 2011. She worked full time as a telephone account manager at the employer's call center. Her last day of work was July 19, 2012. The employer discharged her on that date. The reason asserted for the discharge was use of vulgar language within the hearing of employees and potentially within the hearing of callers on line with call floor representatives.

The claimant's normal work shift ends at 4:00 p.m. On July 18 the claimant was still on a call shortly after 4:00 p.m.; the caller was not satisfied with the information the claimant was providing, and asked to speak to the claimant's supervisor. The claimant put the caller on hold and informed her supervisor that the caller wished to speak with the supervisor. The supervisor

refused to take the call. The claimant became upset with the supervisor's refusal, and there was some back and forth between the claimant and the supervisor as to why the supervisor would not take the call and what the claimant was supposed to do with the call. The claimant ultimately returned to the call, advised the claimant to call back the next day and to ask to have the call escalated to a supervisor, and ended the call. She then indicated to her supervisor she was going to go ahead and leave before she said something disrespectful to the supervisor.

The claimant clocked out and then went to speak to Ralston in the employer's human resources department. She expressed to Ralston how unhappy she was with her supervisor and requested to be transferred to another team. She then went to another manager and again expressed her unhappiness with her supervisor and her desire to be transferred to another team. That manager agreed to the claimant's request to be transferred, and instructed her to report to the other team the next morning. The claimant then left the facility for the day.

At some point after clocking out, either while on her way to speak to Ralston or on her way out of the facility after speaking to the other manager, the claimant passed by an area where there were some trainees and a supervisor/trainer; this area was within about ten feet of where there were representatives on the phones with callers. The employer provided a second-hand statement and information asserting that as the claimant passed through this area, she was saying, "I hate this f - - - ing place, this is f - - - ing b - - - s - - -." The claimant denied using any vulgar language that day while she was in this area or in the employer's facility.

Because of the employer's conclusion that the claimant had used vulgar language within the hearing of other employees and particularly within hearing of the call floor, the employer discharged the claimant.

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. 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. 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. 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 her alleged use of vulgar language near the trainees and near the call floor. The employer relies exclusively on the second-hand account from trainees and the supervisor/trainer; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether those persons might have been mistaken, what they actually heard or where they were when the claimant passed by, or whether they are credible. 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 actually used vulgar language near the call floor or the trainees. 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.

DECISION:

The representative's August 27, 2012 decision (reference 01) is reversed. 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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