

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DIANA M ASMUS
Claimant

APPEAL NO. 07A-UI-01149-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ACCESS DIRECT TELEMARKETING INC
Employer

**OC: 01/07/07 R: 03
Claimant: Respondent (1)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Access Direct Telemarketing filed a timely appeal from the January 25, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 15, 2007. Claimant Diana Asmus participated. Alyce Smolsky of Johnson & Associates/TALX UC eXpress represented the employer and presented through Program Manager Katie Murph. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Diana Asmus was employed by Access Direct telemarketing as a full-time inbound Telephone Sales Representative until January 2, 2007, when Program Manager Katie Murph discharged her. The decision to discharge Ms. Asmus was prompted by a telephone call between Ms. Asmus and a customer that the employer's quality assurance staff monitored on December 31, 2006. On January 1, Ms. Murph received a written report from the quality assurance staff concerning Ms. Asmus' handling of the call. The report from the quality assurance staff indicated that Ms. Asmus had failed to ask required questions during the call. Ms. Murph did not listen to the call. The employer did not present testimony from anyone who listened to the call.

Ms. Asmus had received prior warnings for failure to ask required questions during telephone calls with customers. The most recent warning had been issued by Ms. Murph on December 18, and had been based on a report from the quality assurance staff. Ms. Murph had not listened to the call. The reprimand on December 18 was originally based on two calls, but one call was disregarded after it was discovered that the quality assurance staff erroneously concluded that Ms. Asmus had hung up on a customer.

REASONING AND CONCLUSIONS OF LAW:

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 this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The employer has failed to present sufficient direct and satisfactory evidence to substantiate and corroborate the alleged final incident that prompted the discharge, or prior incidents, despite having the ability to present such direct and satisfactory evidence. Ms. Murph did not listen to the call that prompted the discharge. The employer presented neither the call itself nor testimony from anyone who reviewed the call. The evidence in the record fails to establish the necessary "current act" upon which a discharge for misconduct must be based. See 871 IAC 24.32(8).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Asmus was discharged for no disqualifying reason. Accordingly, Ms. Asmus is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Asmus.

DECISION:

The Agency representative's January 25, 2007, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs