

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

MICHELLE L KING
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ACCESS DIRECT TELEMARKETING NIC
c/o JOHNSON & ASSOCIATES
PO BOX 6007
OMAHA NE 68106-0007

Appeal Number: 06A-UI-00579-JTT
OC: 12/18/05 R: 04
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Access Direct Telemarketing filed a timely appeal from the January 13, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 1, 2006. Claimant Michelle King participated. Dawn Fox of Johnson & Associates represented the employer and presented testimony through Program Manager Josh Hendrickson and Quality Assurance Supervisor Elisa Lynn Marshall.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Michelle King was employed by Access Direct Telemarketing as a full-time Telephone Sales Representative from April 25, 2005 until December 21, 2005, when Quality Assurance Supervisor Elisa Marshall discharged her.

On December 21, 2005, supervisor Jason Clausen contacted Ms. King just prior to the end of her shift and summoned her to a meeting. Also in attendance at the meeting were Program Manager Josh Hendrickson and Quality Assurance Supervisor Elisa Marshall. Ms. Marshall advised Ms. King that the employer had decided to discharge Ms. King due to her misrepresentation of a product during a telephone sales call. The employer did not reference the date or time of the call. The employer did not review the telephone call with Ms. King. Ms. Marshall presented Ms. King with a termination form. Ms. Marshall advised Ms. King that the employer needed Ms. King to sign the form and exit the workplace quietly. The meeting lasted three minutes.

The employer asserts the discharge was based on a telephone sales call Ms. King made on December 19. Ms. King believes the call in question took place on December 16. Access Direct stores recorded telephone calls in its computer network for 10 years. The employer did not provide the administrative law judge with a copy or a transcript of the recorded call, and did not play the call at the time of the hearing. Quality Assurance Supervisor Elisa Marshall listened to a recording of the telephone call in question. The employer's other witness for the hearing, Program Manager Josh Hendrickson, did not listen to the telephone call. Ms. Marshall concluded that Ms. King misrepresented the product to the prospective customer. Specifically, the employer asserts that Ms. King failed to inform the customer of his obligation to pay shipping and handling charges if he chose to return the product at the end of a trial period. Ms. King had, in fact, followed the employer's "script" for the conversation and had provided the prospective customer with appropriate information during the telephone call. When the customer interrupted Ms. King to ask about charges associated with the product, Ms. King responded according to the "script." Ms. King did not knowingly or intentionally make misrepresentations regarding the product during the telephone call.

The employer had previously reprimanded Ms. King for misrepresenting a different product on November 22, 2005. On that date, the employer had reassigned Ms. King from one sales campaign to another midway through her shift. During a telephone sales call on the second, and less familiar, sales campaign, Ms. King mistakenly gave the prospective customer information that pertained to the first, more familiar, sales campaign. The employer reprimanded Ms. King for the error and warned that a similar mistake could result in discharge.

The employer had previously reprimanded Ms. King on July 5, 2005, for "mis-dispositioning" a completed telephone sales call. At the end of each completed call, Ms. King was expected to enter a two-digit code to indicate whether the call had resulted in a sale or refusal. Regarding one call on the day in question, Ms. King mistakenly entered the call as a sale instead of a refusal.

Ms. King handled 60 to 100 telephone sales calls during each shift. Ms. King had received no formal reprimands aside from those referenced above.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. King was discharged for misconduct in connection with the employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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 to 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 evidence in the record fails to prove, by a preponderance of the evidence, that Ms. King intentionally misrepresented a product in connection with the telephone sales call that prompted the discharge. The evidence fails to establish by a preponderance of the evidence that Ms. King carelessly and/or negligently misrepresented a product in connection with the telephone call.

Thus, the evidence in the record fails to establish a current act of misconduct that might serve as a basis for disqualifying Ms. King for benefits. See 871 IAC 24.32(8). The employer had the ability to present more direct and satisfactory evidence of the call in question and failed to do so. The evidence the employer presented failed to sufficiently support or corroborate the allegation of misconduct. See 871 IAC 24.32(4). The administrative law judge infers that such evidence would have revealed deficiencies in the employer's case. Even if the evidence had established carelessness and/or negligence on the part of Ms. King in connection with the telephone call that prompted the discharge, the evidence would not have established sufficiently recurring negligence and/or carelessness to prove a willful or wanton disregard of the interests of the employer.

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

DECISION:

The Agency representative's decision dated January 13, 2006, reference 01, 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.

jt/kjw