

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TERESA K FOREMAN
Claimant

APPEAL NO: 09A-UI-06565-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HEARTLAND COMMUNICATIONS GROUP
Employer

OC: 03/22/09

Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Teresa K. Foreman (claimant) appealed a representative's April 16, 2009 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Heartland Communications Group, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 2, 2009. The claimant participated in the hearing and was represented by Michele Van Wyhe, attorney at law. Amanda Holmes appeared on the employer's behalf and presented testimony from one other witness, Sara Blair. 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?

FINDINGS OF FACT:

The claimant started working for the employer on August 6, 2007. She worked full time as an advertising sales representative in the employer's Spencer office of its publishing and marketing business. Her last day of work was March 26, 2009. The employer discharged her on that date. The reason asserted for the discharge was making inappropriate phone calls, having a poor attitude, making insubordinate and disparaging remarks about her supervisor, and misuse of the employer's phone and email.

The employer asserted that after a training exercise on March 24 the claimant had told the supervisor that it was a "waste of time" and "load of crap." The claimant denied making these statements. The claimant left early due to illness on March 24 and was absent on March 25. As a result, her supervisor opened and reviewed the claimant's email. He found an email to a coworker referring to him being an "a - -." Further review of email from the claimant's home email to a friend's work email yielded another reference inquiring whether he was acting like an "a - -."

A check of the claimant's call history since March 9 resulted in discovering some personal calls the claimant had made to a hotel, a credit card company and a bank. There were also calls to a "rejection hotline," and one or two calls to a number identified as a phone sex hotline. The employer indicated that due to these findings, it was discharging the claimant.

The claimant admitted that she had referred to her supervisor as an "a - -." However, she testified that this type of language was common in that office, including by the supervisor regarding both himself and others. She admitted making the personal calls to the hotel, the credit card company, and the bank. Again she indicated that this type of personal call was permitted and even encouraged by the supervisor, despite an official company policy to the contrary; there had even been occasions where the supervisor had instructed her to make personal calls, such as to arrange golf dates. The claimant acknowledged that someone had passed around the rejection hotline number as a "sales lead" number as a joke, and that likewise someone had distributed the number which turned out to be for the phone sex hotline, and that this was typical of the kidding that went on in the office, including with the knowledge and participation of the supervisor.

The claimant asserted that the supervisor had searched for and found an excuse to discharge the claimant out of retaliation for the claimant rebuffing him when they had gone to a trade show in January and the supervisor had become drunk and left the claimant a threatening message on her phone if she did not open her door to him. She further asserted that while the two had been acquaintances even prior to the supervisor being employed at the employer, that after the January event she had distanced herself from him, and that he had viewed this distancing as a potential threat against his hopes for a promotion for which he was being considered. The administrative law judge concludes that the claimant has credibly established these as plausible motivations on the part of the supervisor to find a way to discharge the claimant, even though the conduct was as a whole conduct that was treated as commonplace and accepted in that office.

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 comments about the supervisor in the emails and her use of the phone. Under the circumstances of this case, given the general practice and atmosphere in the office, the claimant's behavior was at worst the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, and was a good faith error in judgment or discretion. 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 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 April 16, 2009 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.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs