

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LYNN VOGEL

Claimant

APPEAL NO. 07A-UI-10812-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ACCESS DIRECT TELEMARKETING INC

Employer

**OC: 10/14/07 R: 03
Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the November 14, 2007, reference 01, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on December 10, 2007. Claimant participated. Employer participated through Bryan Vranscomv and Melissa Marston and was represented by Tom Kuiper of Johnson & Associates. Employer's Exhibit 1 was received.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a full time "consultive sales representative" from March 31, 2003 until October 18, 2007 when she was discharged. On October 18 after claimant's supervisor Adam Wahl told her to sign out on the break board, Melissa Marston overheard claimant using profanity about Wahl saying, "This is fucking bullshit, he's making me waste my break." Wahl did not hear specific language but confronted her and told her to take it outside. Claimant responded, "Get out of my face" and went on break. (Employer's Exhibit 1-4 and 1-5)

Employer had warned her for an unprofessional conduct issue most recently on August 28, 2007 when the shift manager observed her muttering under her breath during an August 27 training session "oh just shut up" and "if you knew the answer, then you wouldn't be getting it wrong." (Employer's Exhibit 1-6) On May 11, 2007 claimant was on the calling floor in between customers and continued for about ten seconds to have an audible conversation with a coworker while a customer was on the line after having been automatically dispatched to her phone. Claimant became aware of defective equipment after she signed the counseling form. (Employer's Exhibit 1-7)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code § 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 use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made." *Myers v. EAB*, 462 N.W.2d 734 (Iowa App. 1990).

While claimant denies using the language, employer's first-hand testimony and documented history of discipline is credible. Her use of the vulgar statements in reference to her supervisor's directive in combination with the history of comments in the August 2007 training session and subsequent warning, amounts to job misconduct and is disqualifying.

DECISION:

The November 14, 2007, reference 01, decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/pjs