

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

LISA J RIDER
1707 S 7TH AVE APT A10
MARSHALLTOWN IA 50158

ACCESS DIRECT TELEMARKETING INC
C/o TALX – JOHNSON & ASSOCIATES
PO BOX 6007
OMAHA NE 68106 0007

Appeal Number: 04O-UI-11668-DWT
OC: 08/19/04 R: 02
Claimant: Appellant (2)

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 are 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

STATEMENT OF THE CASE:

Lisa J. Rider (claimant) appealed a representative's August 19, 2004 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits, and the account of Access Direct Telemarketing, Inc. (employer) would not be charged because the claimant had been discharged for disqualifying reasons. On September 23, 2004, a hearing was held before another administrative law judge. Based on the evidence presented during this hearing, the administrative law judge determined the claimant was qualified to receive unemployment insurance benefits. The employer appealed the September 27 decision to the Employment Appeal Board. The Employment Appeal Board discovered the hearing tape was blank and remanded this matter to the Appeals Section for a new hearing.

After hearing notices were again mailed to the parties' last-known addresses of record, a telephone hearing was held on November 23, 2004. The claimant responded to the hearing notice, but the administrative law judge was not able to contact the claimant even though the

phone number the claimant provided was called for over ten minutes. When the claimant could not be contacted, the employer was contacted. Suzanna Ettrich, attorney at law, represented the employer. Nate Bradbury, a program manager in July 2004, and Travis Vaughn, a quality assurance representative, appeared on the employer's behalf.

After the hearing had been closed and the employer had been excused, the claimant contacted the Appeals Section. The claimant requested that the hearing be reopened. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Should the hearing be reopened?

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant began working for the employer on May 17, 2004 as a full-time telephone sales representative. The employer hired the claimant as a 60-day probationary employee.

During the course of the claimant's employment, the employer implemented a zero tolerance policy about swearing at work. This policy went into effect in June 2004.

On July 29, 2004, the claimant flagged Vaughn so she could talk to him. After Vaughn approached the claimant, she told him, "I think that's a bunch of bullshit." Vaughn had no idea why the claimant made the remark and perceived her to be somewhat frustrated. Vaughn immediately reported the incident to management.

The employer discharged the claimant on July 29 for using profanity on the call floor. When the incident occurred, the claimant made the remark in her normal voice. The employer does not know if any other telephone sales representative's heard the claimant's remark. There had been problems of a similar nature with the claimant.

After the hearing had been closed and the employer had been excused, the claimant contacted the Appeals Section. The claimant does not have a phone and provided the phone number of a pay phone prior to the hearing. She was waiting for the phone call at 9:00 a.m. While she was waiting for the hearing, the pay phone rang several times, but no one responded when the claimant answered the phone. When the claimant did not receive a call for her hearing, she went back to her home because she did not have the phone number for the Appeals Section with her. The claimant used the pay phone and called the Appeals Section around 9:25 a.m. By the time the claimant called the Appeals Section, the hearing had been closed and the employer had been excused. The claimant made a request to reopen the hearing.

REASONING AND CONCLUSIONS OF LAW:

If a party responds to a hearing notice after the record has been closed and the party who participated at the hearing is no longer on the line, the administrative law judge can only ask why the party responded late to the hearing notice. If the party establishes good cause for responding late, the hearing shall be reopened. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. 871 IAC 26.14(7)(b) and (c).

The claimant made reasonable efforts to participate in the hearing. She provided the number of a pay phone because she does not have a phone. For an unknown reason, calls the administrative law judge attempted at the pay phone did not go through. The claimant admitted she should have taken the paperwork she received for the hearing with her, but did not because she was in a hurry to get to the pay phone in time. If the claimant had the paperwork and the phone number of the Appeals Section, she would have contacted the Appeals Section while the hearing was still in progress. Since the claimant did not contact the Appeals Section until 9:25 a.m. and the decision is in her favor, her request to reopen the hearing is denied.

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges her for reasons constituting work-connected misconduct. Iowa Code §96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The employer established compelling business reasons for discharging the claimant because she violated the employer's policy about using profanity on the call floor. This isolated incident does not by itself amount to work-connected misconduct. On July 29, the claimant was frustrated about something when she asked to talk to Vaughn. While her comment was not professional, her comment amounts to an error in judgment and is not an intentional and substantial disregard of the standard of behavior the employer has a right to expect from an employee. As of August 1, 2004, the claimant is qualified to receive unemployment insurance benefits.

The employer is not one of the claimant's base period employers. During the claimant's current benefit year, the employer's account will not be charged.

DECISION:

The claimant's request to reopen the hearing is denied. The representative's August 19, 2004 decision (reference 01) is reversed. The employer discharged the claimant for compelling business reasons, but the claimant did not commit work-connected misconduct. As of August 1, 2004, the claimant is qualified to receive unemployment insurance benefits, provided she meets all other eligibility requirements. The employer's account will not be charged during the claimant's current benefit year.

dlw/pjs