IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CHEYENNE E MILLIGAN
Claimant

DM SERVICES INC
Employer

APPEAL NO. 11A-UI-12786-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/04/11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Cheyenne Milligan (claimant) appealed a representative's September 22, 2011 decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits because she was discharged from work with DM Services (employer) for conduct not in the best interest of the employer. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for October 20, 2011. The claimant participated personally. The employer participated by Dawn White, operations manager; Kathy St. Clair, assistant supervisor for collections; and Marcia Schmitt, shift supervisor. The claimant offered and Exhibit A was received into evidence. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on April 30, 2001 as a full-time collector/analyst. The claimant signed for receipt of the employer's handbook. She also received the Commission Program rules, which indicated that an employee would receive a verbal warning, written warning with forfeiture of 50 percent of commissions and bonuses, a probation with 100 percent loss of commissions and bonuses prior to termination in a twelve-month period. The employer could terminate without following the procedure if the violations were serious or willful. Serious and willful violation might include using racial, derogatory, profane or libelous comments toward a customer. The claimant was involved in approximately 200 calls per day.

In the claimant's last twelve months, she received a written warning and indefinite probation on June 28, 2011, for unprofessional behavior with a customer. The employer discovered the call through the monitoring process. The claimant asked the employer if she would lose commission for this infraction. The employer told the claimant she might lose commission if she had another infraction. On the warning under the heading "Training or Special Direction to Be

Provided," the employer indicated that it would monitor the claimant and encourage her to make up her own improvement plan. The warning notified the claimant that further infractions could result in termination from employment.

On August 29, 2011, an unknown employee noted that the claimant called the support line to ask why a payment from a customer was sent back. The unknown employee told the claimant she was loud and being rude. No warning was issued.

On August 31, 2011, an unknown co-worker reported to the employer that the claimant exhibited inappropriate behavior on a customer call. The employer listened to the recording of the call and terminated the claimant on September 2, 2011, for being rude and unprofessional. The claimant wished she had been more patient but did not do anything differently than she had done for ten years. She did not receive any training after the June 28, 2011, warning and thought she would receive a warning that reduced her commissions and bonuses before she would be terminated.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged for misconduct.

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 establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Misconduct connotes volition. A failure in job performance which results from inability or incapacity is not volitional and therefore not misconduct. Huntoon v. Iowa Department of Job Services, 275 N.W.2d 445 (Iowa 1979). The employer discharged the claimant for poor work performance and has the burden of proof to show evidence of intent. The claimant's poor work performance was a result of her lack of training regarding appropriate behavior.

An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. Inasmuch as employer had not followed its own rules regarding termination and has not provided evidence of intent, it has not met the burden of proof to establish that claimant acted deliberately or negligently in violation of company policy, procedure, or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. In this case, the claimant was given different information by the employer. She was told she could be terminated. She was told that her next infraction might result in a reduction in commission. The employer did not meet its burden of proof to show misconduct, because it was unclear in its directives. Benefits are allowed.

DECISION:

The representative's September 22, 2011 decision (reference 01) is reversed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed.

_____
Beth A. Scheetz
Administrative Law Judge

_____
Decision Dated and Mailed

bas/kjw