

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JACKIE A CLARK
Claimant

APPEAL NO. 10A-UI-13794-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

TM1 STOP LLC
Employer

OC: 09/05/10
Claimant: Respondent (1)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated September 29, 2010, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on November 19, 2010. The claimant participated. The employer participated by Jim Hunter, operations manager. The record consists of the testimony of Jim Hunter; the testimony of Jackie Clark; and Employer's Exhibits 1 through 4.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a telephone marketing company. Both inbound and outbound calls are made. The claimant was a telephone sales representative. He was responsible for calling existing, new, and former clients of AT&T. He was hired on June 20, 2005. His last day of work was August 31, 2010. He was terminated on September 7, 2010.

The incident that led to the claimant termination occurred on August 27, 2010. The employer had received a customer complaint. This customer had received a modem for high speed internet access. The customer informed the employer that she had not decided for certain on whether she wished to purchase this service.

The claimant was the representative with whom the customer had dealt with over the phone. The claimant wrote up the order as a provisional order, since he knew that the customer wanted a call back concerning the service. The claimant also discussed the situation with Jim Hunter, the operations manager. The provisioning department wrote the transaction as a sale and that, in turn, led to the modem being sent to the customer.

The claimant was terminated because the employer believed he had made an unauthorized charge to the customer's account.

REASONING AND CONCLUSIONS OF LAW:

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Errors of judgment or discretion in isolated instances are not disqualifying misconduct. The employer has the burden of proof to show misconduct.

There is insufficient evidence of misconduct in this record. The claimant testified that he knew the customer had not made a final decision on purchase of the high speed internet. He wrote up the transaction as provisional and even discussed it with Jim Hunter, his supervisor. The employer has a practice known as provisioning, which is designed for this type of situation. The claimant thought he made it clear to the provisioning department that this was not a completed sale, but someone in that department put the transaction through. This appears to be a mistake on someone's part. Even if the claimant made a mistake, there is no evidence that the claimant engaged in this type of behavior or had been warned about this in the past. Since the employer has not submitted sufficient evidence of misconduct, benefits are allowed if the claimant is otherwise eligible.

DECISION:

The representative's decision dated September 29, 2010, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw