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

ALBERT BROOKS
1335 – 13TH PL
DES MOINES IA 50314

ACCESS DIRECT TELEMARKETING INC
C/O JOHNSON & ASSOCIATES
NOW TALX UC EXPRESS
PO BOX 6007
OMAHA NE 68106-6007

Appeal Number: 05A-UI-02995-RT
OC: 02-13-05 R: 02
Claimant: Respondent (1)

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 is 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 for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Access Direct Telemarketing, Inc., filed a timely appeal from an unemployment insurance decision dated March 15, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Albert Brooks. After due notice was issued, a telephone hearing was held on April 5, 2005, with the claimant participating. Dennis Dorman, Supervisor, and Ernie Seemann, Center Manager, participated in the hearing for the employer. The employer was represented by Jessica Meyer, of Johnson & Associates, now TALX UC eXpress. Employer's Exhibits One and Two were admitted into evidence. The administrative law judge takes official

notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One and Two, the administrative law judge finds: The claimant was employed by the employer as a full-time telephone sales representative (TSR) from June 23, 2003 until he was separated from his employer on September 10, 2004. The claimant worked for the employer on September 2, 2004. On September 3, 2004, the claimant was ill with a continuing and recurring medical condition of which the employer was aware. The claimant notified the employer at 10:15 a.m. that he was not going to be at work because of his illness. The claimant was told at that time to call back. However, the claimant was unable to call back because of severe pain. After going to see his physician the claimant went into the employer on September 3, 2004 at approximately 3:00 p.m. to pick up his check. At that time he was informed by an administrative assistant that he had been discharged for his attendance. The claimant went home and never returned to work. The employer's witnesses testified that the claimant was not discharged but rather was absent as a no-call/no-show for five days, September 3, 2004 and from September 6, 2004 to September 9, 2004, and therefore he was considered to be a voluntary quit. The employer has a policy as shown at Employer's Exhibit One that requires that an employee who is going to have an unscheduled absence must notify the employer within one hour either before or after the start time of that employee. The claimant did not notify the employer on and after September 6, 2004, because the claimant believed that he was discharged. Generally, if an employee calls in an absence, the call is taken by one of three individuals and the claimant's supervisor, Dennis Dorman, one of the employer's witnesses, would have been notified. If there is not one of those three individuals available to take the call, the employee is told to call back. The employer's witnesses testified that in the telephone conversation with the claimant on September 10, 2004, he was told that he was discharged when he was a no-call/no-show for all of those absences.

On July 27, 2004, the claimant left work early because of pain related to his medical condition but he had permission to leave work early. The claimant did have prior absences but all were properly reported by the claimant and all were related to his personal illness. The employer's policy does not require a doctor's note for an absence due to personal illness and the claimant was never instructed to provide such a doctor's note. The claimant did receive a verbal warning for his attendance on May 4, 2004 and two written warnings on May 14, 2004 and June 14, 2004. The claimant then received two final written warnings as shown at Employer's Exhibit Two on July 28, 2004 and August 4, 2004. Pursuant to his claim for unemployment insurance benefits filed effective February 13, 2005, the claimant has received unemployment insurance benefits in the amount of $1,544.00 as follows: $193.00 per week for eight weeks from benefit week ending February 19, 2005 to benefit week ending April 9, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.

2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(7) provides:

> (7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The administrative law judge should first address the character of the separation. The claimant maintains that he was discharged on September 3, 2004 when he came in at 3:00 p.m. to pick up his check and was told by the administrative assistant that he was discharged for poor attendance. The employer's witnesses now maintain that the claimant was discharged but on September 10, 2004 when he was informed by telephone that he was discharged for five absences as a no-call/no-show as set out in the findings of fact. Previously, the employer had maintained that the claimant voluntarily quit. The employer now maintains that the claimant was discharged and the administrative law judge so concludes. As discussed below, the administrative law judge notes that the claimant's absences after September 3, 2004, were

justified and would not therefore establish an intention to terminate the employment relationship and would not be overt acts to carry out that intention as required for a voluntary quit by Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980). The real issue is when the claimant was discharged; the claimant maintains it was on September 3, 2004; the employer maintains it was on September 10, 2004. The administrative law judge concludes that there is not a preponderance of the evidence that the claimant was discharged on September 10, 2004. The claimant credibly testified that he came to work on September 3, 2004 at 3:00 p.m. after his start time to pick up his check and was told at that time by the administrative assistant that he was discharged for poor attendance. The claimant's testimony is credible. It is at variance with his statement at fact finding but the administrative law judge concludes that the claimant's testimony at the hearing was credible. The claimant testified that he came in on September 3, 2004 prior to a long series of absences and a week prior to his telephone call with Ernie Seemann, Center Manager, specifically to pick up his check. The claimant testified that employees were paid every two weeks and he specifically recalls coming in to get his check when he was told by the administrative assistant that he was discharged. He also came in a week prior to all of the absences. Further, the evidence establishes that prior to September 2, 2004, the claimant always properly reported his absences to the employer. Even the employer's witnesses concede this. The claimant had established a practice of properly reporting his absences. Why would then he fail to report a series of five absences unless he truly believed that he had been discharged. Accordingly, the administrative law judge concludes that the claimant was discharged or at least justifiably believed that he was discharged on September 3, 2004. The issue then becomes whether the claimant was discharged for disqualifying misconduct.

It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism. As noted above, the claimant was absent without reporting his absences between September 6, 2004 and September 9, 2004. The claimant does not disagree but testified that he was discharged or justifiably believed that he was discharged on September 3, 2004 and would, therefore, have no reason to come to work or notify the employer. Accordingly, the administrative law judge concludes that even if the claimant had been discharged on September 10, 2004, that these absences were with reasonable cause and the claimant had a reasonable explanation for not properly reporting them as much as he justifiably believed that he was discharged on September 3, 2004. The claimant also testified credibly that he was absent on September 3, 2004 because of illness and that he properly reported this to the employer at approximately 10:15 a.m. well before the start of his shift at 12:00 noon. The claimant concedes that he was told to call back and speak to someone else but the claimant was unable to do so because of the pain associated with his condition. The administrative law judge is concerned as to how the claimant could later on at 3:00 p.m. be well enough to get his check but the claimant testified that he went to the doctor and the doctor gave him some relief and the claimant then went to get his check. The administrative law judge must conclude on the evidence here that this absence was for personal illness and properly reported. The claimant also left work early on July 27, 2004, again for his personal illness and he had permission to do so. The claimant also had other absences but the evidence establishes that these were all properly reported and all were for his personal illness. The claimant was credible in testifying about his medical condition causing the

absences. His testimony is supported by the testimony of Dennis Dorman, Supervisor and one of the employer's witnesses, when Mr. Dorman testified that he was aware of the claimant's medical condition. The employer's policy does not require doctor's notes for absences related to personal illness and Mr. Dorman conceded that he never told the claimant that he needed doctor's notes for his absences. Under the evidence here, the administrative law judge is constrained to conclude that all of the claimant's absences prior to September 6, 2004, were for personal illness and properly reported and are not excessive unexcused absenteeism. The absences thereafter were for reasonable cause and a failure to properly report was justified. Therefore, the administrative law judge concludes that the claimant's absences were not excessive unexcused absenteeism and not disqualifying misconduct. It is true the claimant received a number of warnings for his attendance including two final written warnings as shown at Employer's Exhibit Two. However, as noted above, the claimant's absences themselves were not excessive unexcused absenteeism.

In summary, the administrative law judge concludes that the claimant's absences were not excessive unexcused absenteeism and not disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged on September 3, 2004, but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification for unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395 (Iowa App. 1989). The administrative law judge concludes there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

Iowa Code section 96.3-7 provides:

> 7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
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> If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $1,544.00 since separating from his employer on or about September 3, 2004 and filing for such benefits effective February 13, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of March 15, 2005, reference 01, is affirmed. The claimant, Albert Brooks, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

pjs/pjs