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

SETON K SMITH
1703 EDGEBROOK DR APT C4
MARSHALLTOWN IA 50158

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

Appeal Number: 04A-UI-10020-RT
OC: 08/22/04 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 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

STATEMENT OF THE CASE:

The claimant, Seton K. Smith, filed a timely appeal from an unemployment insurance decision dated September 10, 2004, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on October 7, 2004, with the claimant participating. The employer, Access Direct Telemarketing, Inc., did not participate in the hearing. The employer did not call in a telephone number, either before the hearing or during the hearing where any witnesses could be reached for the hearing as instructed in the notice of appeal. Further, the employer's representative, Johnson & Associates, faxed a written statement to the administrative law judge informing the judge that the employer elected not to participate in the hearing. 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 witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time telemarketer from June 20, 2004 until he was discharged on August 16, 2004. The claimant was discharged for not reading a verbatim statement on a confirmation closing. On August 12, 2004, while reading the verbatim statement he was suppose to, the claimant misread the statement and used the word "could" instead of the word "will." The claimant was then discharged. The claimant had previously received a final written warning for the same thing. The claimant had accidentally entered into the computer some erroneous information and his supervisor was helping him. The claimant skipped the page with the approval of the supervisor but he omitted the price. The claimant was then given a final written warning. However, the next step in the employer's discipline process would have been just a written warning and not a final written warnings. At that time, the claimant was told that he should not worry about the final written warning and that if it was necessary it would be rewritten as a written warning because the claimant was learning a new system and that is why the claimant made the mistake. The claimant had received a verbal warning for the same offense, but this was never explained to him but merely given to him. The employer's discipline policy requires three warnings before discharge but here the claimant only had two. Although the claimant has received no unemployment insurance benefits since filing for such benefits effective August 22, 2004, records indicate that the claimant is overpaid unemployment insurance benefits in the amount of $788.00 for 2001.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was 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).

The claimant credibly testified, and the administrative law judge concludes, that he was discharged on August16, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been 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. 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. The employer chose not to participate in the hearing and therefore did not provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of his duties and/or evincing a willful or wanton disregard of the employer's interests and/or in carelessness or negligence in such a degree of recurrence, so as to establish disqualifying misconduct. The claimant credibly testified that he was discharged for failing to read a verbatim statement when he misread the statement and replaced the word "will" with the word he used "could." The claimant simply misread the statement. The claimant was then discharged because he had received a previous final written warning for the same thing. On that occasion, the claimant had accidentally entered some wrong information into the computer and the supervisor was helping him out and told him it was okay to skip a page and the claimant did so, but he omitted the price. The claimant was given a final written warning for this incident, but told not to worry about it because he should have received just a written warning under the employer's progressive discipline policy and further the claimant was learning a new system. He was told that if necessary this warning would be re-written as a written warning. It was not and the claimant was discharged for the next violation. The only other warning the claimant received was a verbal warning for reading verbatim but he was never informed exactly what it was that he had done wrong. The employer has a three-step discipline policy requiring first a verbal warning and then a written warning and then a final written warning prior to discharge. The employer did not follow that in this case.

Under the evidence here, the administrative law judge concludes that the claimant's acts, at most, were mere inefficiency, unsatisfactory conduct, failure in good performance, or ordinary negligence in an isolated instance and not disqualifying misconduct. The claimant's minor mistake using the word "could" instead of the word "will" was minor and a mistake and at most negligence. The claimant had received a couple of warnings for these incidents but also had reasonable explanations. The administrative law judge concludes that at most the claimant's behaviors were isolated instances of negligence or mere inefficiency or unsatisfactory conduct, and not disqualifying misconduct. The administrative law judge also notes that, in the claimant's case, the employer failed to follow its own progressive discipline policy. Accordingly, the administrative law judge concludes that the claimant was discharged 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 from unemployment insurance benefits, must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that 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.

DECISION:

The representative's decision dated September 10, 2004, reference 01, is reversed. The claimant, Seton K. Smith, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged, but not for disqualifying misconduct. Records show that the claimant is overpaid $788.00 in unemployment insurance benefits from 2001.

kjf/b