

**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**

**JANSON R BRIGGS
3105 – 30TH ST APT 4
DES MOINES IA 50310**

**ACCESS DIRECT TELEMARKETING INC
c/o JOHNSON & ASSOCIATES
P O BOX 6007
OMAHA NE 68106-6007**

**Appeal Number: 04A-UI-01594-LT
OC 01-11-04 R 02
Claimant: Respondent (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/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

Employer filed a timely appeal from the February 9, 2004, reference 01, decision that allowed benefits. After due notice was issued, a consolidated hearing with 04A-UI-01593-LT was held on March 3, 2004. Claimant did participate for himself and also participated for Lacey Fowler, who was not available for the hearing. Lisa Rich, witness, was not available when the hearing was called and did not participate. Employer did participate through Ryan McDonald and was represented by Peg Heenan of Johnson & Associates. Employer's Exhibit One was received. Claimant's Exhibits A and B were received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time telephone sales representative (TSR) through January 14, 2004 when he was discharged. Claimant was using the dialing software to bypass the third party sale verification for AT&T by JC Penney. The false sales were reported for payment of commissions and bonuses. Kelly Woods discovered the discrepancies between total sales and verified sales calls of claimant. These sales were attributed to claimant by the dialing system log in data. Claimant denied the allegation, however this situation did not appear for other employees, other than the four that were fired for the same reason. An error rate of approximately two calls per month was acceptable but claimant had 41 sales disconnected from verification without sending the sale information to the verification agent on multiple dates. (Employer's Exhibit One) If the sale were not completed in the verification process, a separate record would be generated. They were not in the case of the sales at issue. The cost for employer to manually go through the sales, investigate them and remove erroneous sales is much more than the \$60.00 or \$70.00 in commissions to claimant. (Claimant's Exhibit B) Genuine sales generally take 15 minutes and the sales at issue were reported to take approximately 60 seconds. Information technology department for AT&T verified that this problem would not arise from a spontaneously disconnected call but would have to be manually overridden by the TSR. Some of the phone numbers that were reported as sales without verification were called and revealed disconnects or fax machines, which would normally be removed from the call list. (Employer's Exhibit One)

The claimant has received unemployment benefits since filing a claim with an effective date of January 11, 2004.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related 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.

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 documented false sales lacking verification far in excess of the allowable error rate took place on multiple dates and some were purportedly made through a fax machine. Further, the improbably short sales calls were not documented separately as a failed sale or sale not verified as is the procedure. The preponderance of the evidence supports employer's allegations and claimant has failed to credibly rebut that evidence. False reporting of sales to generate commissions or bonuses is tantamount to theft and is disqualifying misconduct. Benefits are denied.

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.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The February 9, 2004, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant is overpaid benefits in the amount of \$2,070.00.

dml/s