

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

KEVIN B KEMPER  
1306 BANK ST  
KEOKUK IA 52632

ACCESS DIRECT TELEMARKETING INC  
c/o TALX – JOHNSON & ASSOC  
PO BOX 6007  
OMAHA NE 68106 0007

Appeal Number: 06A-UI-01312-DWT  
OC: 01/01/06 R: 04  
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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge  
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Access Direct Telemarketing, Inc. (employer) appealed a representative's January 24, 2006 decision (reference 01) that concluded Kevin B. Kemper (claimant) was qualified to receive unemployment insurance benefits, and the employer's account was subject to charge because the claimant had been discharged for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known address of record, a telephone hearing was held on February 20, 2006. The claimant participated in the hearing. Jessica Meyer, a representative with TALX, appeared on the employer's behalf with witnesses, Josh Hendrickson and Angela Paris. During the hearing, Employer's Exhibit One was offered and admitted as evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Did the employer discharge the claimant for work-connected misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

The claimant started working for the employer on June 27, 2005. The claimant worked as a full-time telephone sales representative. At the time of hire, the claimant received a copy of the employer's rules of conduct. These rules informed the claimant that disruptive or threatening violence in the workplace would not be tolerated by the employer. (Employer's Exhibit One.)

On August 31, the claimant made a comment in the employer's parking lot to a friend about another friend. The claimant's comment about wanting to hit a friend was made in a joking manner. After the employer received information about the comment, the claimant received a final written warning for threatening another employee at work.

On December 17, 2005, the claimant was required to report to work by noon. At 12:04 p.m., the claimant had not punched in on the computer. Hendrickson sent the claimant home from work and assessed him a half of an attendance point. By sending the claimant home early, the claimant lost a bonus. On Monday, December 19, the employer gave the claimant a disciplinary action for the situation on Saturday, December 16. When the claimant went to Hendrickson's office, he assumed the employer was going to give him back his bonus instead of receiving a disciplinary action. The claimant did not say anything negative in Hendrickson's office even though he was upset about receiving discipline and learning he would not get his bonus.

When the claimant left Hendrickson's office, another employee, LAM, asked what happened. As the claimant passed the employee, he mumbled that if he ever saw Hendrickson in a bar he would ..... As the claimant made this comment, or just before he made the comment, Paris approached him as she headed to Hendrickson's office. Paris heard the claimant say he would kill Hendrickson if he ever met him in a bar. She reported this comment to Hendrickson.

Hendrickson met the claimant at his workstation and had him go immediately to his office. When Hendrickson told the claimant he was discharged for threatening Hendrickson, the claimant denied making such a statement. Before the claimant had an opportunity to ask the employer to talk to LAM, the employer indicated the claimant was discharged and the claimant had to leave immediately or police would be called.

The claimant established a claim for unemployment insurance benefits during the week of January 1, 2006. The claimant filed claims for the weeks ending January 7 through February 25, 2006. The claimant received his maximum weekly benefit amount of \$201.00 for each of these weeks.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected

misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good-faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

After receiving the August 31, 2005, warning, the claimant knew he could be discharged if he ever made threatening comments about an employee at work, even if the comment was made in a joking manner. On December 19, the claimant did not say anything inappropriately to Hendrickson when he received the discipline. The claimant appeared to accept the discipline and did not say or do anything to suggest he was upset with Hendrickson. The claimant was, however, upset with the employer, because the discipline meant the claimant would lose some bonus money. While he was upset, the claimant made a comment that if he ever saw him (Hendrickson) outside of work.... Even if the claimant did not finish the sentence, he was upset with Hendrickson and let off steam and released his frustration with Hendrickson. The claimant's comment – complete or incomplete – had a threatening connotation. The claimant already knew the employer did not any permit potential threats made as a joke.

The claimant's comment constitutes a threatening remark. When considering the context of the comment, letting off steam after being disciplined, the evidence establishes that the claimant intended his comment as a threat. The claimant committed work-connected misconduct. Therefore, as of January 1, 2006, the claimant is not qualified to receive unemployment insurance benefits.

If an individual receives benefits he is not legally entitled to receive, the Department shall recover the benefits even if the individual acted in good faith and is not at fault in receiving the overpayment. Iowa Code § 96.3-7. The claimant is not legally entitled to receive benefits for the weeks ending January 7 through February 25, 2006. The claimant has been overpaid \$1,608.00 in benefits for these weeks.

#### DECISION:

The representative's January 24, 2006 decision (reference 01) is reversed. The employer discharged the claimant for reasons constituting work-connected misconduct. The claimant is disqualified from receiving unemployment insurance benefits as of January 1, 2006. This disqualification continues until he has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged. The claimant is not legally entitled to receive benefits for the weeks ending January 7 through

February 25, 2006. The claimant has been overpaid and must repay a total of \$1,608.00 in benefits he received for these weeks.

dlw/kjw