

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

JERRY A DITHMART
416 – 2ND ST SW APT A
CEDAR RAPIDS IA 52404

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

Appeal Number: 05A-UI-06664-RT
OC: 05/22/05 R: 03
Claimant: Appellant (2-R)

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 96.5-1 – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant, Jerry A. Dithmart, filed a timely appeal from an unemployment insurance decision dated June 14, 2005, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on July 14, 2005, with the claimant participating. The employer, Access Direct Telemarketing, Inc., did not participate in the hearing because by letter from its representative, Johnson & Associates, now TALX UC eXpress, the employer elected not to participate and the employer also did not call in any telephone numbers, either before the hearing or during the hearing, where witnesses could be reached for the hearing, as instructed in the notice of appeal. 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 telemarketer from February 2, 2004, until he voluntarily quit on August 3, 2004. The claimant informed his trainer on that day, August 3, 2004, that he was quitting. The claimant quit because the employer lost its contract with DirecTV and the claimant did not feel that his job was secure. The claimant also believed that in the last month of his employment, after the employer had lost its account with DirecTV, that he did not feel that he could be honest with the customers with whom he spoke. The claimant also was expecting training in regards to a pest control company in Florida, but when he arrived at the training, he found that that contract had been dropped and it was training in regards to credit cards. Because of all of these matters the claimant felt that his job was unsecure and quit. The claimant did express concerns to the employer about these matters, but never specifically threatened or indicated an intention to quit if his concerns were not addressed.

The claimant had two jobs in hand at the time he quit; one with Mary Goad, PO Box 245 Hiawatha, Iowa 52233, and the other with Walter Colquhoun, no address. The claimant worked for both for the balance of 2004, and earned from the two \$2,489.00. He received a W-2 form from Mary Goad for his earnings in 2004, but did not receive such a form from Walter Colquhoun. The claimant also worked for Walter Colquhoun in 2005, earning a "couple" thousand dollars more. Work slowed up and the claimant filed for unemployment insurance benefits effective May 22, 2005. The claimant has been spending significant time trying to start his own business to become self-employed.

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 96.5-1-a provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department. But the individual shall not be disqualified if the department finds that:

a. The individual left employment in good faith for the sole purpose of accepting other or better employment, which the individual did accept, and the individual performed services in the new employment. Benefits relating to wage credits earned with the employer that the individual has left shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

871 IAC 24.26(2)(3)(4) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

- (2) The claimant left due to unsafe working conditions.
- (3) The claimant left due to unlawful working conditions.
- (4) The claimant left due to intolerable or detrimental working conditions.

The claimant credibly testified that he voluntarily quit on August 3, 2004, and the administrative law judge so concludes. The issue then becomes whether the claimant left his employment without good cause attributable to the employer. The administrative law judge concludes that the claimant has the burden to prove that he has left his employment with the employer herein with good cause attributable to the employer. See Iowa Code section 96.6-2. The administrative law judge concludes that the claimant has met his burden of proof to demonstrate by a preponderance of the evidence that he left his employment with the employer herein with good cause attributable to the employer. The claimant credibly testified that he quit because he did not feel his job was secure once the employer lost its account with DirecTV. The claimant credibly testified that he felt that he was not allowed to be honest with persons with whom he spoke and his training was not what he had been promised. The claimant expressed concerns to the employer but received no adequate response. The employer did not participate in the hearing to provide evidence to the contrary. The administrative law judge concludes on the evidence here that the claimant's working conditions were intolerable and detrimental. The administrative law judge further concludes that the claimant gave the employer sufficient opportunity to address his concerns, but the employer did not. Accordingly, the administrative law judge concludes that the claimant left his employment voluntarily with good cause attributable to the employer and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided he is otherwise eligible.

The claimant also credibly testified that he left his employment with the employer herein to accept other employment with Mary Goad and Walter Colquhoun. The claimant testified that he had those jobs in hand and worked at both jobs after leaving the employer. The claimant also credibly testified that the earnings from the two employers totaled \$2,489.00 in 2004. This would be enough to have allowed the claimant to requalify to receive unemployment insurance benefits following his separation from the employer herein even if that separation had been disqualifying. However, neither employer reported earnings for the claimant to Iowa Workforce Development. The claimant testified that he received a W-2 for 2004 from Mary Goad, but received no form from Walter Colquhoun. It is not now necessary to determine whether these earnings were covered employment so as to relieve the employer herein from charges for unemployment insurance benefits to which the claimant is entitled relating to wage credits earned with the employer herein because the administrative law judge above concluded that the claimant left his employment voluntarily with good cause attributable to the employer. However, if the employment from the two employers, Mary Goad and Walter Colquhoun were covered employment, the claimant would also not be disqualified to receive unemployment insurance benefits even if his separation from the employer herein had been disqualifying. This matter should be remanded to Tax for an investigation and determination as to whether the claimant had earnings from Mary Goad, PO Box 245 Hiawatha, Iowa 52233 and Walter Colquhoun, no address, that would be covered employment and subject to reporting to Iowa Workforce Development.

During the hearing the claimant testified that he was spending significant time in trying to start his own business to become self-employed. The issue as to whether the claimant would be ineligible to receive unemployment insurance benefits because at relevant times he is and was

not able, available, and earnestly and actively seeking work was not set out on the notice of appeal, and the administrative law judge does not now have jurisdiction to decide that issue. Because the claimant is spending significant time trying to start his own business to become self-employed, this matter must be remanded to Claims for an investigation and determination as to whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times he was not able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3.

DECISION:

The representative's decision of June 14, 2005, reference 01, is reversed. The claimant, Jerry A. Dithmart, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he left his employment voluntarily with good cause attributable to the employer. Although the claimant has received no unemployment insurance benefits since filing for such benefits effective May 22, 2005, records show that the claimant is overpaid unemployment insurance benefits in the amount of \$510.00 for 2001. This matter must be remanded to Tax for an investigation and determination as to whether the claimant's earnings from Mary Goad and Walter Colquhoun in 2004 were from covered employment and subject to Iowa Workforce Development reporting. This matter must also be remanded to Claims for an investigation and determination as to whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times he was not able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 because he was involved in spending significant time in becoming self-employed and starting his own business.

REMAND: (TAX)

This matter is remanded to Tax for an investigation and determination as to whether the earnings that the claimant received from Mary Goad and Walter Colquhoun in 2004 were earnings from covered employment and subject to Iowa Workforce Development reporting.

REMAND: (CLAIMS)

This matter is remanded to Claims for an investigation and determination as to whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times he is and was not able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 because he was devoting time and effort to becoming self-employed and starting his own business.

kjw/kjw