

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

BERNARD A BALL
204 JEWELL DR #2
AMES IA 50010

ACCESS DIRECT TELEMARKETING INC
c/o JOHNSON AND ASSOCIATES
TALX UC EXPRESS
PO BOX 6007
OMAHA NE 68106-6007

Appeal Number: 04A-UI-02329-RT
OC: 02-01-04 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 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 February 24, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Bernard A. Ball. After due notice was issued, a telephone hearing was held on March 22, 2004 with the claimant participating. Ken Leighty, Supervisor, participated in the hearing for the employer. The employer was represented by Peg Heenan of Johnson and Associates now TALX UC eXpress. 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, the administrative law judge finds: The claimant was employed by the employer as a telemarketing sales person from November 20, 2002 until he was discharged on January 31, 2004 for using profanity while talking to a customer. On or about January 31, 2004, while talking to a customer, the claimant used the word "damn." The employer has very clear policies which were distributed to the employees including the claimant on January 21, 2004 prohibiting all profanity on the floor and providing that a violation can result in a final warning or discharge and prohibiting all profanity to a customer and providing for immediate discharge as the result of a violation. This rule is also contained in the employee handbook, a copy of which the claimant received and for which he signed an acknowledgement. The claimant was aware of this rule. Every morning prior to beginning work there is a meeting held with the employees, including the claimant, and at the meeting they are warned to avoid profanity. The claimant had received no specific warnings about this behavior. The claimant used the word "damn" while talking to a customer and since it was a sales call it was taped. The tape was reviewed and the word "damn" is clearly heard on the tape. Pursuant to his claim for unemployment insurance benefits filed effective February 1, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,776.00 as follows: \$222.00 per week for eight weeks from benefit week ending February 7, 2004 to benefit week ending March 27, 2004.

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.
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

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).

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The evidence clearly establishes that the employer has very specific rules prohibiting the use of profanity while talking to a customer and further providing that a violation of such rule results in immediate discharge. A copy of these rules was distributed to the employees, including the claimant, on January 21, 2004 and are also contained in the employer's handbook, a copy of which the claimant received and for which he signed an acknowledgement. The claimant testified that he was aware of these rules. Nevertheless, on or about January 31, 2004, the claimant used the word "damn." The employer's witness, Ken Leighty, Supervisor, testified that he heard the tape of the claimant's conversation and heard the word "damn" clearly and it was the claimant's voice. Others listened to the tape and agreed that the claimant had used that word. The claimant's testimony was equivocal. He testified that he thought he had used the word "dang" but equivocated. When the claimant was first approached by Mr. Leighty, he told Mr. Leighty that he might have used the word "damn." The claimant had no explanation as to why he would use either word. The claimant even admitted that he used slang. The administrative law judge must conclude here that the testimony of Mr. Leighty is more credible than that of the claimant's because it was straightforward and honest and the claimant equivocated about using the word "damn" and further admitted that he used slang. The administrative law judge is not sure why the claimant would even use the word "dang" which is very similar to the word "damn" when he was aware of the employer's very strict policies prohibiting profanity. In Myers v. Employment Appeal Board, 462 N.W.2d 734, 738 (Iowa App. 1990), the Iowa Court of Appeals provided that the use of profanity or offensive language in a confrontational, disrespectful or name-calling context may be recognized as misconduct even in the case of isolated incidents or situations in which the target of abusive name-calling is not present. Here, the target of the name-calling was present even if this was an isolated incident.

Accordingly, because of the Myers case and the employer's very clear rules prohibiting profanity while talking to a customer and further providing for immediate discharge upon such a violation, the administrative law judge is constrained to conclude that the claimant's behavior in his use of the word "damn" was a deliberate act or omission constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evinces a willful or wanton disregard of the employer's interests. The administrative law judge concludes that what happened here because of the very specific rules is more than an isolated instance of ordinary negligence or a good faith error in judgment. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct, and, as a

consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,776.00 since separating from the employer herein on or about January 31, 2004 and filing for such benefits effective February 1, 2004, to which he is not entitled and for which he is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of February 24, 2004, reference 01, is reversed. The claimant, Bernard A. Ball, is not entitled to receive unemployment insurance benefits until or unless he requalifies for such benefits. He has been overpaid unemployment insurance benefits in the amount of \$1,776.00.

tjc/kjf