

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

THOMAS E WILLIAMS  
3120 – 4<sup>TH</sup> ST  
DES MOINES IA 50313

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

Appeal Number: 05A-UI-05958-RT  
OC: 05-08-05 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, 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 96.5-1 – Voluntary Quitting  
Section 96.5-2-a – Discharge for Misconduct  
Section 96.4-3 – Required Findings (Able and Available for Work)

STATEMENT OF THE CASE:

The claimant, Thomas E. Williams, filed a timely appeal from an unemployment insurance decision dated May 26, 2005, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on June 21, 2005, with the claimant participating. Becky Thomas, Human Resources Manager, participated in the hearing for the employer, Access Direct Telemarketing, Inc. The employer was represented by Suzanna Ettrich of Johnson & Associates, now TALX UC eXpress. Employer's Exhibit One was admitted

into evidence. 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, including Employer's Exhibit One, the administrative law judge finds: The claimant was employed by the employer as a telephone sales representative from April 19, 1999 until he separated from his employment on or about April 18, 2005. In the spring of 2005 the claimant was ill with some mysterious condition. The claimant requested a leave of absence for this illness from March 8, 2005 to March 21, 2005 as shown at Employer's Exhibit One. This illness was not related to the claimant's employment. The employer approved the request for a leave of absence and the claimant went on the leave of absence. When the claimant was unable to return to work on March 21, 2005 because of the continuing illness, he called Gentry Cox, the administrative assistant from whom he had obtained the leave of absence papers and to whom he had provided the completed papers. He explained to Ms. Cox that he was still under a doctor's care and could not return to work. Ms. Cox told the claimant that she would pass this information on to the Center Manager, Jason. On March 23, 2005, the claimant spoke personally to Jason and indicated that he was still under a doctor's care and would not be able to work. Jason said that this was fine. At that time the claimant said he hoped to return on March 28, 2005. When the claimant was not able to return to work that day because of his continuing illness, he called Ms. Cox and informed her of this and Ms. Cox told him he did not need to keep calling in. At all material times hereto the claimant thought he was on leave pursuant to the Family and Medical Leave Act (FMLA). The claimant did not contact the employer thereafter.

When the claimant ceased contacting the employer, the employer extended the claimant's leave of absence to April 18, 2005. When the claimant failed to return or contact the employer thereafter, the employer believed the claimant had quit and took measures to implement the quit. On or about April 30, 2005, the claimant received a letter from his medical insurance carrier, Blue Cross/Blue Shield which indicated that he was a former employee of the employer and that he was eligible for COBRA. The claimant then called Ms. Cox on May 2, 2005. Ms. Cox called Becky Thomas, Human Resources Manager and the employer's witness. Ms. Thomas informed Ms. Cox who then informed the claimant that the claimant needed to bring in a doctor's form indicating that the claimant was still under his doctor's care. The claimant did so and then called Ms. Thomas on May 5, 2005. At that time the claimant indicated that he was still under a doctor's care and that he still believed he was on FMLA leave. Ms. Thomas told him no, that his personal leave had ended on April 18, 2005 and that he was separated from his employment since he had not returned to work following his personal leave of absence. Ms. Thomas told the claimant that he could return to work but he would lose all of his benefits and he could only return to work as a new hire making \$8.00 an hour instead of the \$14.50 per hour he had been making prior to his leave.

No later than May 21, 2005, the claimant was released by his physician to return to work without restrictions. The claimant did not notify the employer and seek re-employment because he had previously been told that he could only be re-employed at the lower pay and without his benefits. The claimant has placed no restrictions on his availability for work including days or times when he could or could not work. The claimant is earnestly and actively seeking work by making two in-person job contacts each week. The claimant had been on a FMLA leave in November 2004 and had provided some kind of a doctor's statement at that time to ensure the FMLA leave.

## 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 not.
2. 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. The claimant is not ineligible to receive unemployment insurance benefits for those reasons.

Iowa Code section 96.5-1-d 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:

d. The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

871 IAC 24.22(2)j(1)(2)(3) provides:

Benefit eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

j. Leave of absence. A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period.

(1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits.

(2) If the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits.

(3) The period or term of a leave of absence may be extended, but only if there is evidence that both parties have voluntarily agreed.

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).

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The first issue to be resolved is character of the separation. The employer maintains that the claimant left his employment voluntarily when he failed to return from a personal leave of absence on April 18, 2005. The claimant maintains that he was effectively discharged on or about April 30, 2005 when he learned he was separated from his employment by a letter from his health insurance carrier, Blue Cross/Blue Shield. For the reasons discussed below, the administrative law judge concludes that it really makes no difference which type of separation occurred. Nevertheless, the administrative law judge concludes that the claimant was on a leave of absence with the return date of March 21, 2005, which was extended by the employer to April 18, 2005 and the claimant did not return to work after the leave of absence. Therefore,

the administrative law judge concludes that the claimant left his employment voluntarily when he failed to return from his leave of absence. 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. There does not appear to be any dispute between the parties that at all material times hereto the claimant was seriously ill with an illness that was mysterious and went undiagnosed for sometime. This illness caused the claimant to go on a leave of absence. The claimant believed that it was a leave of absence under the Family Medical Leave Act (FMLA) but the request for his leave of absence as shown at Employer's Exhibit One is clearly not under the Family Medical Leave Act. However, the leave was for illness. The administrative law judge concludes that the claimant's belief that he was on a leave of absence under the Family Medical Leave Act is not wholly credible and is part of the reason for the conclusion noted above that the claimant failed to return from a regular leave of absence and, therefore, voluntarily quit. The claimant did not return from his leave of absence because he was still ill and suffering from his illness which still had gone undiagnosed. The claimant informed the employer of this on several occasions and was finally informed that he did not have to keep calling the employer and the claimant ceased to do so. When the claimant learned that he had been separated from his employment he called the employer and eventually learned on May 5, 2005 that when he could present a release by his physician, he could return to work but that he would lose his benefits and would face a reduction in pay from the \$14.50 per hour he was earning to \$8.00 per hour. At that time the claimant had not been released by his physician formally but the claimant was expecting such a release. The claimant was released from his physician no later than May 21, 2005 without restrictions.

The administrative law judge concludes, that what in effect occurred here, was a voluntary quit of the claimant's employment because of a non employment-related illness or injury. The claimant did not quit his employment upon the advice of a licensing and practicing physician but was certainly unable to return to work during this period of time because of the advice of a licensing and practicing physician and the administrative law judge believes that this satisfies the requirement that the claimant leave upon the advice of a licensing and practicing physician because the employer treated the claimant's failure to return to work as a voluntary quit and the claimant failed to return to work because of the advice of his licensing and practicing physician. The employer had knowledge of the necessity for the claimant's absences. Eventually the claimant's recovery was certified by his physician and he was released without restrictions. The claimant did not return to his employer and offer to perform services because he had previously been informed that he would not be allowed to return to his regular work with his regular pay and benefits. This was confirmed by the employer's witness, Becky Thomas, Human Resources Manager, who testified that the employer's policy requires that someone in the claimant's situation return to work at a starting pay rather than his old pay. The administrative law judge also concludes that the claimant's regular work or comparable suitable work includes the claimant's original pay and benefits and this was denied to him. The administrative law judge concludes that, in effect, the claimant offered to return to work with his recovery certified but his regular work or comparable suitable work including his benefits and pay were not available. Thereafter, at that point, the claimant was no longer disqualified to receive unemployment insurance benefits. Accordingly, the administrative law judge concludes that although the claimant left his employment voluntarily without good cause attributable to the

employer, when he offered to return to work and was fully released by his physician and he was not offered his regular work at his regular benefits and pay, he was not disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant from and after he was released from his physician no later than May 21, 2005 and would be entitled to unemployment insurance benefits for benefit week ending May 28, 2005 and continuing thereafter. The administrative law judge finally concludes that the claimant was not required to return to the employer after his full release to work and offer to go back to work because he had already been told his regular job and pay were not available.

Even should the claimant's separation be considered a discharge, and this would be the case if the claimant justifiably believed he was on Family Medical Leave and was discharged while that leave was still pending, the administrative law judge would still conclude that the claimant was not disqualified to receive unemployment insurance benefits. The administrative law judge would conclude that the claimant was discharged for his absences but his absences were due to personal illness and were properly reported or his failure to properly report the absences was excused by the employer. Under these circumstances, the administrative law judge would conclude that the claimant's absences were not excessive unexcused absenteeism and not disqualifying misconduct. See 871 IAC 24.32(7). Accordingly, even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he would not be disqualified to receive unemployment insurance benefits and he would still be entitled to such benefits.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The administrative law judge concludes that the claimant has the burden of proof to demonstrate by a preponderance of the evidence that he is and was, at relevant times, able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 or was otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has met his burden of proof to demonstrate by a preponderance of the evidence that by May 21, 2005, the claimant was able, available, and earnestly and actively seeking work. The claimant testified that he was released by his physician to return to work no later than May 21, 2005 and this is confirmed by a decision by an authorized representative of Iowa Workforce Development dated May 27, 2005 at reference 03. The claimant credibly testified that he has placed no restrictions on his availability for work and is earnestly and actively seeking work by making two in-person job contacts each week. Accordingly, the administrative law judge concludes that the claimant was able, available, and earnestly and actively seeking work on and after May 22, 2005 and would be entitled to receive unemployment insurance benefits beginning with benefit week ending

May 28, 2005 and continuing thereafter provided he remains able, available, and earnestly and actively seeking work and is otherwise entitled to such benefits.

DECISION:

The representative's decision of May 26, 2005, reference 01, is reversed. The claimant, Thomas E. Williams, is entitled to receive unemployment insurance benefits beginning May 22, 2005 or beginning with benefit week ending May 28, 2005 and continuing thereafter because although the claimant left his employment voluntarily without good cause attributable to the employer, he left because of personal illness and he returned to his employer and offered to go back to work and no suitable comparable work was available. The claimant is able, available, and earnestly and actively seeking work as of May 22, 2005 and would not be ineligible to receive unemployment insurance benefits beginning May 22, 2005 or for benefit week ending May 28, 2005, for this reason.

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