

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

JOHN E SOUKUP  
PO BOX 10181  
CEDAR RAPIDS IA 52410-0181

ACCESS DIRECT TELEMARKETING INC  
c/o JOHNSON & ASSOCIATES  
PO BOX 6007  
OMAHA NE 68106-0007

Appeal Number: 06A-UI-03780-JTT  
OC: 07/03/05 R: 03  
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, 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

John Soukup filed a timely appeal from the March 28, 2006, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on April 24, 2006. Claimant participated. The employer failed to respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. The employer had notice of the hearing as indicated by TALX UC eXpress' faxed request on April 13, 2006, for a copy of the Agency administrative file.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: John Soukup was employed by Access Direct Telemarketing as a full-time telephone sales representative from December 2005 until March 1, 2006, when a supervisor notified him he was

being suspended pending a decision regarding whether he would be allowed to continue in the employment. The supervisor instructed Mr. Soukup to contact the employer's Human Resources department on March 2 at 8:30 a.m. and to contact supervisor Brian Boscam at 10:00 a.m. Mr. Soukup contacted the Human Resources office as directed and was advised that the Human Resources department had no information regarding the incident that prompted the suspension. Mr. Soukup attempted to contact Mr. Boscam at the appointed hour, but was forced to leave a voice mail message for Mr. Boscam. Mr. Soukup did not hear anything further from the employer and concluded he had been discharged from the employment.

The final incident that prompted the discharge occurred on March 1, 2006, when Mr. Soukup mistakenly dispositioned a sales call. Mr. Soukup handled several hundred sales calls per day. Regarding the call in question, Mr. Soukup was supposed to have entered a disposition code of "20" to indicate the customer was not to be called again. Instead, Mr. Soukup entered "30" which would place the customer in a group to be contacted at a later date. Mr. Soukup thought he had dispositioned the call appropriately by entering "20." In February, Mr. Soukup had been reprimanded for mistakenly dispositioning a call. However, at the time of the reprimand, Mr. Soukup pointed out to the supervisor that he had dispositioned the call pursuant to the training he had received. Mr. Soukup had no other reprimands in the course of the employment.

#### REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Soukup was discharged for misconduct in connection with the employment. It does.

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 employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The employer failed to appear for the hearing and, therefore, failed to provide any evidence to corroborate and/or substantiate the allegation that it discharged Mr. Soukup for misconduct. The evidence in the record establishes only that Mr. Soukup made an innocent mistake in one call out of the hundreds he handled on the day in question. The evidence fails to establish that Mr. Soukup was careless, negligent, or that he intentionally entered the wrong disposition code for the call in question.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Soukup was discharged for no disqualifying reason. Accordingly, Mr. Soukup is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Soukup.

#### DECISION:

The Agency representative's decision dated March 28, 2006, reference 02, is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

jt/kkf