

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

EROL W DERKSEN  
875 E CO RD 550  
WARSAW IL 62379-3209

ACCESS DIRECT TELEMARKETING INC  
c/o TALX EMPLOYER SERVICES  
f/k/a JOHNSON & ASSOCIATES  
PO BOX 6007  
OMAHA NE 68106-6007

Appeal Number: 06A-UI-07028-DT  
OC: 06/11/06 R: 04  
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 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Erol W. Derksen (claimant) appealed a representative's July 6, 2006 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Access Direct Telemarketing, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 9, 2006. The claimant participated in the hearing and presented testimony from one other witness, Corey LeMaster. Dawn Gibson of TALX Employer Services appeared on the employer's behalf and presented testimony from one witness, Natalie Humphrey. 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.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on October 14, 2003. He worked full time as a telephone sales representative and unofficial equipment expert in the employer's Keokuk, Iowa call center. His last day of work was June 15, 2006. The employer discharged him on that date. The reason asserted for the discharge was using vulgar language on the call floor.

The claimant normally started his shift at 11:30 a.m.; however, on June 15, he clocked in at about 10:30 a.m. because he was working on an equipment issue. At approximately 11:45 a.m. the claimant was walking to the employer's break room when he met up with another telephone sales representative, Mr. LeMaster. The claimant entered the break room followed by Mr. LeMaster. The claimant was telling Mr. LeMaster about the problem he was dealing with and commented that "something is f - - - ed." Mr. LeMaster responded by saying that "you can't say that on the call floor," referring to the employer's unwritten but expressed prohibition against the use of "profanity" on the call floor. The prohibition was due to a concern that customers on calls could hear foul language used by someone on the call floor; the bar did not apply to the break room. Mr. LeMaster indicated that he made his comment as a joke. The claimant was not amused and responded that he did not say it on the call floor.

At that time, Ms. Humphrey, an administrative assistant who had followed the claimant and Mr. LeMaster into the break room, rejoined that the claimant had made the statement while on the call floor. The two argued for a few moments, then Ms. Humphrey told the claimant he could take it up with human resources and left. Ms. Humphrey then reported that the claimant had said the "f-word" on the call floor outside the break room, and the employer discharged the claimant. No one in management interviewed Mr. LeMaster regarding the incident, and when he later told the center manager that the claimant had not made the statement on the call floor but rather in the break room, the center manager responded that there was nothing he could do at that time, that the decision was made.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
  - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
  - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
  - a. Manifest equal culpability, wrongful intent or evil design; or
  - b. Show an intentional and substantial disregard of:
    1. The employer's interest, or
    2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is allegedly using vulgar language on the call floor. While the employer did present first-hand testimony that the

claimant did use the language on the call floor, beyond his own denial the claimant also provided corroborating first-hand testimony through Mr. LeMaster that the statement was made in the break room, not outside on the call floor. The administrative law judge finds the testimony of the claimant together with Mr. LaMaster to be more credible. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's July 6, 2006 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

ld/pjs