

**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**

**PHILIP J ABSHIER
813 WESTWINDS DR #2
IOWA CITY IA 52246**

**ACCESS DIRECT TELEMARKETING
c/o TALX UC EXPRESS
PO BOX 6007
OMAHA NE 68106-6007**

**Appeal Number: 05A-UI-06564-CT
OC: 08/01/04 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Philip Abshier filed an appeal from a representative's decision dated June 14, 2005, reference 04, which denied benefits based on his separation from Access Direct Telemarketing, Inc. (Access). After due notice was issued, a hearing was held by telephone on July 12, 2005. The employer participated by Heather Hoyt, Center Manager, and was represented by Suzanne Etrich of TALX UC eXpress. Mr. Abshier did not respond to the notice of hearing.

FINDINGS OF FACT:

Having heard the testimony of the witness and having reviewed all the evidence in the record, the administrative law judge finds: Mr. Abshier was employed by Access from January 24 until

March 18, 2005 as a full-time telephone sales representative (TSR). When a TSR goes on break, he is supposed to turn his telephone off so that incoming calls are not directed to his line. If a call is forwarded to his line and the TSR is not there, the customer is met with silence. Mr. Abshier went to break on February 20 and neglected to turn his telephone off. As a result, there was one missed call. He received a written warning on February 20 advising that he would be discharged for future violations.

On March 18, Mr. Abshier went to break and again neglected to turn his telephone off before leaving. His failure resulted in one missed call. Because he had received a prior warning for the same conduct, Mr. Abshier was discharged on March 18, 2005.

REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Mr. Abshier was separated from employment for any disqualifying reason. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Mr. Abshier was discharged because he twice failed to turn off his telephone before going on break, resulting in a missed call on each occasion. The administrative law judge does not believe he deliberately failed to disconnect his telephone. He was, however, negligent on both occasions.

Negligence does not constitute disqualifying misconduct unless it is so recurrent as to manifest a substantial disregard for the employer's interests or standards. See 871 IAC 24.32(1). Mr. Abshier did receive a final written warning about not turning his telephone off and it was a full month before the conduct occurred again. The administrative law judge concludes that the negligence in this case was not so recurrent as to establish a substantial and intentional disregard for the employer's interests or standards. The conduct was not so willful or wanton as to rise to the level of disqualifying misconduct. While the employer may have had good cause to discharge, conduct which might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). For the reasons stated herein, benefits are allowed.

DECISION:

The representative's decision dated June 14, 2005, reference 04, is hereby reversed. Mr. Abshier was discharged by Access but disqualifying misconduct has not been established. Benefits are allowed, provided he satisfies all other conditions of eligibility.

cfc/pjs