

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

RUBEN AGUERO
716 – 20TH AVE APT 104
CORALVILLE IA 52241

ACCESS DIRECT TELEMARKETING INC
C/o TALX UCM SVCS– JOHNSON & ASSOC
PO BOX 6007
OMAHA NE 68106-0007

Appeal Number: 04A-UI-10609-DWT
OC: 10/19/03 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 are 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

STATEMENT OF THE CASE:

Ruben Aguero (claimant) appealed a representative's September 27, 2004 decision (reference 04) that concluded he was not qualified to receive unemployment insurance benefits, and the account of Access Direct Telemarketing, Inc. (employer) would not be charged because the claimant had been discharged for disqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 27, 2004. The claimant participated in the hearing. Ann Mangiameli, a representative with TALX UCM Express, appeared on the employer's behalf as the employer's representative. Heather Campbell, the center manager, and Travis Eichelberger, the program manager, appeared as witness for the employer. 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:

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on May 12, 2004. He worked as a full-time telephone sales representative.

On August 23, 2004, the employer gave the claimant a written warning and put him on a 30-day attendance probation because he had accumulated four attendance occurrences. The warning informed the claimant that for the next 30 days he had to be on time for every shift, work his entire shift without exception, could not be late from any break, could not use PTO unless he had requested it two weeks in advance, and no work could be requested off without PTO. The warning indicated that if the claimant failed to comply with any of these conditions he could be immediately discharged.

Prior to September 3, the claimant requested five hours of PTO. This request was granted. After the claimant reported to work on September 3, he asked his lead person if he could leave work early. The lead person asked the claimant if he had PTO time and the claimant confirmed he did. The lead person gave the claimant permission to leave work early as long as he made it up during the weekend. The claimant did not see Eichelberger in the facility when he was at work on September 3.

After the claimant reported to work on September 7, the employer discharged the claimant for violating the 30-day attendance probation by leaving work early on September 3. The claimant had been authorized to five hours of PTO time, not six and a half hours of PTO.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code §96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000). For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The law presumes excessive unexcused absenteeism is an intentional disregard of the claimant's duty to an employer and amounts to work-connected misconduct except for illness or

other reasonable grounds for which the employee was absent and has properly reported to the employer. 871 IAC 24.32(7).

Although the employer asserted during the hearing the claimant had requested PTO for September 4 instead of September 3, the claimant's testimony is more credible than the employer's testimony on this point. This conclusion was reached because after the claimant corrected the employer on the date the last incident occurred, the employer retracted some testimony. The claimant did not change his testimony. The employer, however, relied on reports or records, which were not always read or interpreted correctly by the employer's witness.

The employer established a compelling business reason for discharging the claimant because he violated the 30-day attendance probation. Based on the probation, the claimant could not leave work unless he had received prior authorization for PTO. On September 3, the claimant relied on his lead person's authorization that he could leave work early as long as he made up the time that weekend. If the lead person had not told the claimant he could do leave work early, the claimant would have stayed and worked another 90 minutes. Even if the claimant should have asked Eichelberger about leaving work early instead of the person he talked to, the claimant still relied on a supervisor's authorization to leave 90 minutes early on September 3. For unemployment insurance purposes, the claimant did not intentionally or substantially fail to work as scheduled. The claimant did not commit work-connected misconduct. As of September 5, 2004, the claimant is qualified to receive unemployment insurance benefits.

If the employer is one of the claimant's base period employers, its account may be charged for benefits paid to the claimant.

DECISION:

The representative's September 27, 2004 decision (reference 04) is reversed. The employer discharged the claimant for business reasons that do not constitute work-connected misconduct. As of September 5, 2004, the claimant is qualified to receive unemployment insurance benefits, provided he meets all other eligibility requirements. If the employer is a base period employer, the employer's account may be charged for benefits paid to the claimant.

dlw/b