

**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

**CALE W SMITH
416 BOONE ST APT 4
BOONE IA 50036**

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

**Appeal Number: 04A-UI-12764-RT
OC: 10-31-04 R: 02
Claimant: Appellant (1)**

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:

The claimant, Cale W. Smith, filed a timely appeal from an unemployment insurance decision dated November 17, 2004 reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on December 21, 2004, with the claimant participating. Ryan Pervier, Program Manager in the employer's Ames, Iowa location, and Catherine Johnson, Quality Assurance Representative, participated in the hearing for the employer, Access Direct Telemarketing, Inc. The employer was represented by Alyce Smolsky, of Johnson & Associates, now TALX UC eXpress. Employer's Exhibits 1 and 2 were admitted into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits 1 and 2, the administrative law judge finds: The claimant was employed by the employer as a full-time telephone sales representative (TSR) from July 1, 2002 until he was discharged on October 27, 2004. The claimant was discharged for hanging up on leads or refusing to talk to a customer who had been automatically dialed by the employer's dialing apparatus. The employer has a policy, of which the claimant was aware, providing for zero tolerance for hanging up on leads. The policy provides that such violation can result in discharge. On October 27, 2004, the claimant hung up on two leads. The first time he did so, he hung up because he thought the call had ended. The second time, the claimant was frustrated and angry, and hung up on the second lead. Both calls were monitored by the employer's witness, Catherine Johnson, Quality Assurance Representative, who reported this and the claimant was discharged. Just six days earlier, the claimant had received a re-issued final warning for hanging up on a lead. The employer did not discharge the claimant at that time because it gave him a second chance. On September 29, 2004, slightly more than one month prior to the re-issued final written warning, the claimant received a final written warning for hanging up on a lead. This warning is shown at Employer's Exhibit 1. The claimant understood, after the final written warning, that he could be discharged for another offense.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was.

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. Hunton v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The parties agree, and the administrative law judge concludes, that the claimant was discharged on October 27, 2004.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. There is little dispute between the parties concerning the facts here. On October 27, 2004, the claimant hung up on two calls or leads in a row. He did so the first time because he thought the call had ended and did so the second time because he was frustrated and angry about the first call. The employer has a zero tolerance policy for such behavior in its policy and the claimant was aware of this policy. The claimant had just, six days earlier, received a re-issued written warning for the same behavior. A little more than one month earlier than that, the claimant had received a final written warning for this behavior, as shown at Employer's Exhibit 1. Because of the employer's policy, of which the claimant was aware, and because of the repeated warnings, the administrative law judge concludes that the claimant's behavior in hanging up on leads were deliberate acts or omissions constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evince a willful or wanton disregard of an employer's interest and, at the very least, are carelessness or negligence in such a degree of recurrence all as to establish disqualifying misconduct. Accordingly, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant, until or unless he requalifies for such benefits.

DECISION:

The representative's decision dated November 17, reference 01, is affirmed. The claimant, Cale W. Smith, is not entitled to receive unemployment insurance benefits until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct.

b/b