

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

ADAM T DERR
705 LOCUST ST
MONTROSE IA 52639

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

Appeal Number: 050-UI-06230-H2T
OC: 03-06-05 R: 04
Claimant: Respondent (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/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 29, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 27, 2005 before administrative law judge Scheetz. The claimant did not participate. The employer did participate through Dawn Fox and Josh Hendrickson. The claimant appealed to the Employment Appeal Board alleging he did not have an opportunity to participate because he did not receive the hearing notice. After due notice was again issued, a hearing was held on July 1, 2005. The claimant did participate. The employer did participate through Josh Hendrickson, Program Manager and was represented by Alyce Smoksky of Johnson & Associates. Employer's Exhibit One was received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a telephone sales representative full time beginning July 7, 2003 through March 8, 2005 when he was discharged. The claimant improperly dispositioned a call where the customer asked to be placed on the "do not call" list. The claimant indicated that the customer should be called back. The employer faces fines from the FCC for improperly dispositioned calls. The employer believes that the claimant just made a mistake and was not intentionally trying to improperly disposition the call. The claimant had been previously disciplined for improperly dispositioning a call on January 6, 2005. At that time he was given a final written warning that put him on notice his job was jeopardy.

The claimant was discharged due to allegations of not working fast and efficiently according to the employer's expectations. He had not received any warnings that his job was in jeopardy and performed the work to the best of his ability.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. Kelly v. IDJS, 386 N.W.2d 552 (Iowa App. 1986). Inasmuch as he did attempt to perform the job to the best of his ability but was unable to meet the employer's expectations, no intentional misconduct has been established, as is the employer's burden of proof. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Accordingly, no disqualification pursuant to Iowa Code section 96.5-2-a is imposed.

Although improper, the conduct does not rise to the level of disqualification by standards of either frequency or severity. The claimant merely made a mistake, as such the administrative law judge cannot conclude that the employer has established sufficient misconduct to disqualify him from receiving unemployment insurance Benefits are allowed, provided the claimant is otherwise eligible. 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).

DECISION:

The March 29, 2005, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

tkh/pjs