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

LAVHONDA E MARTIN
1100 6TH ST SE
CEDAR RAPIDS IA 52403

ACCESS DIRECT TELEMARKETING INC
C/O JOHNSON & ASSOCIATES
NOW TALX UC EXPRESS
P O BOX 6007
OMAHA NE 68106-6007

Appeal Number: 04A-UI-02678-RT
OC: 02/01/04 R: 03
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, LaVhonda E. Martin, filed a timely appeal from an unemployment insurance decision dated February 26, 2004, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on March 31, 2004, with the claimant participating. Aaron Johnson, Program Manager, and Melissa Burrows, Operations Supervisor, participated in the hearing for the employer, Access Direct Telemarketing, Inc. The employer was represented by Peg Heenan, of Johnson & Associates, now TALX UC eXpress. Employer's Exhibit One was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibit One, the administrative law judge finds: The claimant was employed by the employer first as a full-time, and then as a part-time telephone sales representative (TSR) from July 4, 2003 until she was discharged on February 3, 2004. The claimant averaged 23.5 hours per week while part-time. The claimant was discharged for violating the employer's policy in regards to the requirement that a telephone sales representative must respond twice to every phone call. The employer has a policy in its handbook, a copy of which the claimant received and for which she signed an acknowledgement and of which she was aware that requires that telephone sales representatives respond two times after an objection from the customer. If a customer objects to the statement by the TSR, the TSR is to respond with some statement based upon product knowledge or sales incentives. If the customer again gives an objection, the TSR is to make a second response. Thereafter, it is up to the TSR whether the conversation is continued. The TSR's are given two weeks of training in regard to these matters. Although the claimant was aware of the employer's policy, she did not always make two such responses. On February 2, 2004, a telephone call of the claimant's with a customer was monitored by the claimant's supervisor, Melissa Burrows, Operations Supervisor. Ms. Burrows overheard the claimant fail to make two responses as required. The claimant was then discharged the next day, February 3, 2004. The claimant had failed to make such proper responses on prior occasions receiving a final written warning on January 19, 2004; a written warning on December 23, 2003, and a verbal warning with a written record on December 4, 2003. All of these warnings appear at Employer's Exhibit One. The claimant conceded on these occasions that she did not make the required two responses. On prior occasions when the claimant's phone calls had been monitored, she was able to appropriately make two responses, but sometimes she simply chose not to do so.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from the 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. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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. The employer's witnesses credibly testified that the claimant violated on a number of occasions the employer's policy requiring that a telephone sales representative make two responses to customers after the customer has objected. The claimant, as well as the other telephone sales representatives, are given training as to how to do this. They are to use their product knowledge and sales incentives to pursue sales. This is really a marketing matter. The claimant did not always do so and conceded that she did not do so. The employer's witnesses credibly testified that the claimant was able to appropriately make two responses during other monitored calls, but on the ones in question, she failed to do so. The claimant testified that she did not always make two responses because of "issues." However, the claimant never adequately explained what these issues were. The claimant found it hard to do, but the evidence establishes that she was able to do it on many occasions. When asked about the warnings, the claimant indicated in regard to the final warning on January 19, 2004, that she had these "issues." However, for the warning on December 23, 2003, the claimant testified that she had no reason for not making the two responses, she just did not. Concerning the verbal warning with the written record on December 4, 2003, the claimant stated she did not know the product. The claimant also testified at one point, that there were occasions where she just didn't make a second response. Under the evidence here, including the series of warnings and the claimant's knowledge of the employer's rules and the claimant's ability to make a second response on many calls, the administrative law judge is constrained to conclude that claimant's failures to do so were deliberate acts or omissions constituting a material breach of her duties and obligations arising out of her worker's contract of employment and evince willful or wanton disregard of the employer's interests and is disqualifying misconduct for those reasons. Even more compelling, the administrative law judge concludes that the failures were also carelessness and negligence in such a degree of recurrence so as also to establish disqualifying misconduct.

Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, she is

disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

DECISION:

The representative's decision dated February 26, 2004, reference 01, is affirmed. The claimant, LaVhonda E. Martin, is not entitled to receive unemployment insurance benefits until or unless she requalifies for such benefits.

kjf/b