

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

ANTHONY R POMPO
909 GRAND AVE
MARION IA 52302

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

Appeal Number: 05A-UI-05599-RT
OC: 05/01/05 R: 03
Claimant: Appellant (4)

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
Section 96.5-1 – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant, Anthony R. Pompo, filed a timely appeal from an unemployment insurance decision dated May 20, 2005, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on June 14, 2005, with the claimant participating. Rich Brecht, Call Center Manager in Cedar Rapids, Iowa, where the claimant was employed, and Shana Rausch, Supervisor in Training, participated in the hearing for the employer, Access Direct Telemarketing, Inc. The employer was represented by Jessica Meyer of Johnson & Associates, now TALX UC eXpress. The administrative law judge takes official

notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Department Exhibit One was admitted into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witnesses, and having examined all of the evidence in the record, including Department Exhibit One, the administrative law judge finds: The claimant was employed by the employer as a full-time telephone sales representative (TSR) for between 30 and 60 days until he was separated from his employment on May 6, 2005. On May 5, 2005, the claimant was at work when he was asked to move from inbound calls to outbound calls by the supervisor in training, the only supervisor present at the time, Shana Rausch, one of the employer's witnesses. Ms. Raush testified that the claimant said he would do so but then logged off and left for the day and did not return. The claimant testified that he told Ms. Rausch he was ill and she suggested he go home and he did so. In any event, the next day, May 6, 2005, the claimant returned to work and logged in but was then told that he was discharged by Jeremy Goforth. The claimant then filled out an Employee Separation Form, as shown at Department Exhibit One. The claimant had been concerned about his training from the time he was initially hired, and he made comments about his training in the Employee Separation Form. On the second page, at the top, the words "job abandonment" were whited-out and the claimant wrote in a statement "because I did not feel that I had proper training." On page one of Department Exhibit One, the claimant circled for Termination Type "Term."

Iowa Workforce Development records indicate that the claimant has a disqualifying separation from a prior employer, Nordstrom Inc., on December 8, 2004, by decision dated June 6, 2005, at reference 03. Since that disqualifying separation, the only earnings of the claimant were from the employer herein in the amount of \$2,046.34. The claimant's weekly benefit amount is \$310.00.

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 not.

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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).

The first issue to be resolved is the character of the separation. This is most important in this case because it establishes the burden of proof and, as discussed below, the testimony of the employer's witness, Shana Rausch, Supervisor in Training, and the claimant are diametrically opposed and both are more or less credible. The decision then turns on which party has the burden of proof, and that issue depends on the character of the separation. If the claimant voluntarily quit, he has the burden to establish good cause attributable to the employer. If the claimant was discharged, the employer has the burden of proof to establish disqualifying misconduct. The employer's witnesses maintain that the claimant voluntarily left his employment. The claimant maintains that he was discharged. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant left his employment voluntarily. The evidence establishes that on May 5, 2005, the claimant walked off the job in the middle of his shift. The employer maintains that this was job abandonment and that he quit. However, the claimant had an explanation for doing so. The administrative law judge must look to other evidence to determine whether the claimant quit when he walked off the job. The claimant returned to work the next day and this belies a voluntary quit. The claimant was asked to complete an Employee Separation Form, which he did at Department Exhibit One, and noted on the first page that the termination type was "Term," or termination, rather than "voluntary." Again, this belies a voluntary quit. The claimant testified that he was told by Jeremy Goforth that he was fired. There was no testimony by Jeremy Goforth to the contrary. The claimant did fail to indicate on the Employee Separation Form that he left work the prior day because of illness, but states, rather, that it was for a lack of training. The claimant explained that he filled that in because he was dissatisfied with his training from the beginning of his employment. Finally, and perhaps most compelling, the employer had written in on the Employee Separation Form "job abandonment" and then had whited it out. The administrative law judge does not approve of documents being sent to him for an exhibit with items whited out or altered. The alteration, or the white-out of the words "job abandonment," also belie a voluntary quit. Accordingly, the

administrative law judge concludes that the claimant did not leave his employment voluntarily, but was discharged on May 6, 2005.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Although it is a close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The only witness for the employer with first-hand knowledge was Shana Rausch, Supervisor in Training, who testified that she told the claimant to move from inbound to outbound calls and that he began to do so but then left his work without permission. The claimant testified that, although he was asked to move from inbound to outbound calls, he told Ms. Rausch that he was not feeling well and she suggested he go home and he did so. Both of the witnesses were, more or less, credible. Under the evidence here, the administrative law judge must conclude that the employer has failed to demonstrate by a preponderance of the evidence that the claimant abandoned his job. There is no other evidence of any deliberate acts on the part of the claimant constituting a material breach of his duties and/or evincing a willful or wanton disregard of the employer's interest and/or in carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. There is also no evidence of any related warnings.

In summary, and for all the reasons set out above, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant abandoned his job and, therefore, there is not a preponderance of the evidence of any disqualifying misconduct on the part of the claimant. Accordingly, the administrative law judge concludes that the claimant was discharged on May 6, 2005, but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits as a result of this separation. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits as a result of the separation.

The administrative law judge notes that Iowa Workforce Development records indicate that the claimant is presently disqualified to receive unemployment insurance benefits as the result of a disqualifying separation from Nordstrom, Inc., on or about December 8, 2004, by decision dated June 6, 2005, at reference 03. This decision has not been appealed. Evidence indicates that the claimant has not requalified to receive unemployment insurance benefits following this disqualifying separation because he has not earned in excess of ten times his weekly benefit amount of \$310.00, or \$3,100.00, since that disqualifying separation. The claimant earned only \$2,046.34 from the employer herein and the claimant has had no other earnings. Accordingly, the claimant is not now entitled to receive unemployment insurance benefits as a result of this prior disqualifying separation and such benefits are denied to the claimant until or unless he demonstrates that his separation from Nordstrom, Inc., was not disqualifying and such decision is changed or reversed, or he demonstrates that he has requalified to receive unemployment insurance benefits by earning ten times his weekly benefit amount following his separation from Nordstrom, Inc.

DECISION:

The representative's decision of May 20, 2005, reference 01, is modified. The claimant, Anthony R. Pompo, is not disqualified to receive unemployment insurance benefits as a result of a separation with the employer herein because he was discharged, but not for disqualifying misconduct. However, Iowa Workforce Development records show that the claimant is presently disqualified to receive unemployment insurance benefits as a result of a disqualifying separation from a prior employer, Nordstrom, Inc., on or about December 8, 2004, by decision dated June 6, 2005, at reference 03. The claimant is not entitled to receive unemployment insurance benefits until or unless this decision is reversed or changed, or the claimant has requalified following the disqualifying separation from Nordstrom, Inc., by earning ten times his weekly benefit amount of \$310.00, or \$3,100.00. The claimant has not yet requalified by earning that amount, having earned only \$2, 046.34 from the employer herein, and the claimant has had no other employment or earnings following his separation from Nordstrom, Inc.

kjw/pjs