

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

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ACCESS DIRECT TELEMARKETING INC
c/o JOHNSON & ASSOCIATES
PO BOX 6007
OMAHA NE 68106-0007

Appeal Number: 04A-UI-03897-ET
OC 03-07-04 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/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the March 25, 2004, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on May 18, 2004. The claimant participated in the hearing. Ken Leffler, Center Manager; Yvonne Podhajsky, Program Manager; and Roxanne Bekeart, Employer's Representative, participated in the hearing on behalf of the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time telephone sales representative (TSR) for Access Direct

from September 19, 2002 to March 4, 2004. On March 1, 2004, the claimant was scheduled to work from 9:00 a.m. to 7:30 p.m. as a TSR after being transferred from a training position. He testified he was ill that day but did not try to call the employer and report his absence until 10:30 p.m., at which time he could not reach anyone. The claimant was scheduled to work from 9:00 a.m. to 7:30 p.m. March 2, 2004, but decided to take a personal day and did not call the employer until 10:30 p.m. On March 3, 2004, the claimant reported for his shift at 9:00 a.m. Center Manager Ken Leffler and Program Manager Yvonne Podhajsky called the claimant into the office after lunch to discuss his failure to call in either before his shift or within the first four hours of his shift. The claimant returned to work after the meeting and approximately 45 minutes later he told Ms. Podhajsky he was going to take paid time off (PTO) for the remainder of his shift. Ms. Podhajsky told him he could not leave because he had been gone for two days and the employer needed him on the phone. The claimant stated he needed to go home. After the parties argued about the situation, Ms. Podhajsky told the claimant he could leave but would receive a final written warning for insubordination. Later that evening the claimant and his wife ran into two Access Direct managers, who stated Ms. Podhajsky told the supervisors to "keep an eye" on the claimant. The claimant determined that meant the employer was going to try to terminate his employment. On March 4, 2004, the claimant was scheduled to work at 9:30 a.m. Instead of going to work or calling the employer, the claimant went to Iowa Workforce Development and stated he was worried about losing his job. The claimant called the employer at 3:00 p.m. to report his absence and stated he was taking PTO and Ms. Podhajsky informed him that his employment was terminated for violating the attendance policy by accumulating three no-call/no-shows.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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, (7) 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).

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The employer has the burden of proving disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). While the claimant argues that his absences March 1, 2 and 4, 2004, should not be considered no-call/no-shows, the administrative law judge disagrees. The claimant did not call the employer prior to his scheduled shift or even during the first four hours of his shift, but waited until three hours after his shift ended to report his absences. It is not reasonable to believe the employer would allow employees not to show up for work or call before, or at least during, their shift, because to do so would effectively render any attendance policy meaningless and the employer's policy did address no-call/no-shows. The employer verbally warned the claimant March 3, 2004, about failing to call in to report his absences in a timely manner. Despite that conversation, the claimant did not call to report his absence March 4, 2004 until approximately six hours after the start of his shift. The claimant's actions March 4, 2004 were not an isolated incident and his conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. Consequently, the administrative law judge concludes the employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Benefits are denied.

DECISION:

The March 25, 2004, reference 01, decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

je/b