

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

TERRY J KALVIG
1113 W 7TH
WATERLOO IA 50702

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

Appeal Number: 04A-UI-02442-RT
OC: 06-08-03 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, Terry J. Kalvig, filed a timely appeal from an unemployment insurance decision dated February 27, 2004, reference 07, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on March 29, 2004, with the claimant participating. Ryan French, Program Manager, 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. 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, the administrative law judge finds: The claimant was employed by the employer first as a full-time and then later as a part-time telephone sales representative (TSR) from October 6, 2003 until he was discharged on February 2, 2004. The claimant was discharged for failing to follow the employer's procedures. On January 3, 2004, the claimant "dropped" four calls in a row in violation of the employer's policies and procedures which is covered in training and which is common knowledge. Dropping calls means that a call is not taken by the claimant and he just sits there. This is prohibited. The claimant did this four times in a row and received a final written warning. On January 21, 2004, the claimant was "sitting on a disconnect" for 16 minutes while not on a break, and in fact, during this time, the claimant left his station. A disconnect is when there is no customer there because the telephone number has been disconnected and there is a pause. The claimant then got up to get food and was gone from his station for 16 minutes. When the claimant was on his way back to the station, the employer's witness, Ryan French, Program Manager, asked the claimant if he had been away from his station to get food and the claimant admitted that he had. The claimant went to get food but was not on any kind of break and had not done anything to his station to indicate that he was taking a break or was leaving the station. For this the claimant received a one-day suspension.

On January 31, 2004, the claimant again "dropped" four calls in a row while the claimant was talking to another TSR. The claimant was then discharged on February 2, 2004. The claimant's telephone calls are monitored by the employer and the calls in particular on January 31, 2004 were monitored by the claimant's supervisor. On November 7, 2003, the claimant received a final written warning also for "dropping" calls.

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 witness, Ryan French, Program Manager, credibly testified that on January 31, 2004, the claimant deliberately "dropped" four telephone calls in a row, meaning that he just did not take the calls and sat there while talking to another telephone sales representative. The testimony of Mr. French was most credible because he was quite knowledgeable about the employer's systems. The claimant denied dropping these calls but the claimant's testimony was not credible. The claimant maintained that the customers hung up when they could not hear the claimant although the claimant was attempting to speak to them. The claimant's testimony is not credible. The evidence establishes that his supervisor, who was monitoring the calls, heard both sides of the telephone call so there is no reason why the claimant did not. At one point, the claimant even seemed to concede that he could hear the customer and the customer could hear him.

Just ten days prior to the incident on January 31, 2004, the claimant had received a one-day suspension for "sitting on a disconnect" meaning that a telephone call was made to a number that had been disconnected and the claimant did not take any more calls or make any calls but rather left his station for 16 minutes. The claimant conceded that he left his station to get food and also conceded that he was not on a break. The claimant also conceded that he did not do anything at his station to indicate that he was away from his station. The employer has procedures which are covered in training and are common knowledge that employees do not drop calls or sit on disconnects or leave their station when not on a break without doing something more. Less than three weeks before that, the claimant had received a final written warning for "dropping" four calls in a row. Again, the claimant's denials of this are not credible as noted above. The claimant also received a final written warning on November 7, 2003 for the same behavior.

Because of the number of warnings and disciplines following closely to each other, at least the last two, the administrative law judge is constrained to conclude that the claimant's acts 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 the employer's interests and at the very least are carelessness or negligence in such a degree of recurrence, all as to establish disqualifying misconduct. Therefore, 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 of February 27, 2004, reference 07, is affirmed. The claimant, Terry J. Kalvig, is not entitled to receive unemployment insurance benefits until or unless he requalifies for such benefits.

pjs/kjf