

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

RONALD J SWEARINGEN
Claimant

APPEAL NO. 11A-UI-07068-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ACCESS DIRECT TELEMARKETING INC
Employer

**OC: 04/10/11
Claimant: Respondent (2-R)**

Section 96.5(2)a – Discharge for Misconduct
Section 96.3(7) – Recovery of Overpayments

STATEMENT OF THE CASE:

Access Direct Telemarketing, Inc. filed an appeal from a representative's decision dated May 17, 2011, reference 01, which held that no disqualification would be imposed regarding Ronald Swearingen's separation from employment. After due notice was issued, a hearing was held by telephone on June 23, 2011. Mr. Swearingen participated personally. The employer participated by Christopher Delfosse, human resources, and Adam Wahl, project manager. Exhibit One was admitted on the employer's behalf.

ISSUE:

At issue in this matter is whether Mr. Swearingen was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Swearingen was employed by Access Direct from November of 2005 until April 14, 2011. He was last employed full-time as a customer service representative. He was discharged for repeatedly failing to follow the employer's procedures.

At all times material to this decision, Mr. Swearingen was marketing entertainment coupon books to non-profit organizations as a means of fund-raising. If a potential customer indicated they were not interested, he was to provide a rebuttal to whatever objection they posed for not wanting the product. There are scripted rebuttals for some objections, but not for all. On April 14, 2010, the employer met with Mr. Swearingen concerning the fact that he was not always responding to objections. He understood what the employer identified as the problem and knew what would be expected of him in the future. Because the employer felt the conduct was the product of lack of training, he was not disciplined, only coached.

The employer again coached Mr. Swearingen concerning its expectations on May 17, 2010. He acknowledged that the subject matter on May 17 was the same as that on April 14. The employer did not begin the disciplinary process until May 19, 2010. He was given a verbal

warning on that date because he was again failing to respond to objections. Mr. Swearingen was given written warnings for the same conduct on June 4 and September 2, 2010. He was given a final written warning on October 28, 2010. The problem arose again in January of 2011. However, because he had shown some improvement, he was not discharged at that time but was given another final written warning on January 12, 2011.

The decision to discharge was prompted by the fact that Mr. Swearingen was again failing to offer rebuttals to a customer's objection on April 11, 2011. After he gave his opening, the customer said he was not interested. Rather than trying to find out why the customer was not interested, Mr. Swearingen gave him information on how to make contact if he became interested in the future. As a result of this call, he was discharged on April 14, 2011.

Mr. Swearingen filed a claim for job insurance benefits effective April 10, 2011. He has received a total of \$2,901.00 in benefits since filing the claim.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Mr. Swearingen was discharged because he repeatedly failed to follow the procedures required by the employer. He understood what the employer expected of him and knew from the coachings and warnings that his continued failure to perform to the employer's expectations could result in his discharge. In spite of the warnings, he continued to substitute his own judgment rather than follow the procedures.

The calls in which Mr. Swearingen failed to offer rebuttals may not have resulted in sales. On the other hand, there was also the possibility he may have been able to convince the customer to purchase. He owed it to his employer to at least make a good-faith effort to overcome the customers' objections. The fact that he may have been a top performer in sales is irrelevant. The fact is that the employer had the right to expect him to take those steps necessary to maximize sales. In this case, that meant trying to overcome customers' objections with an aim toward convincing them of the worthiness of the product being offered.

Mr. Swearingen's repeated failure to follow the required procedures had the potential of negatively impacting sales, which was contrary to the employer's best interests and standards. Given the length of his employment and the number of times the issue was addressed with him, it must be concluded that he deliberately and intentionally failed to follow the known standards. For the reasons stated herein, it is concluded that a substantial disregard of the employer's interests has been established. As such, benefits are denied.

Mr. Swearingen has received benefits since filing his claim. Based on the decision herein, the benefits received now constitute an overpayment. As a general rule, an overpayment of job insurance benefits must be repaid. Iowa Code section 96.3(7). If the overpayment results from the reversal of an award of benefits based on an individual's separation from employment, it may be waived under certain circumstances. An overpayment will not be recovered from an individual if the employer did not participate in the fact-finding interview on which the award of benefits was based, provided there was no fraud or willful misrepresentation on the part of the individual. This matter shall be remanded to Claims to determine if benefits already received will have to be repaid.

DECISION:

The representative's decision dated May 17, 2011, reference 01, is hereby reversed. Mr. Swearingen was discharged by Access Direct for misconduct in connection with his employment. Benefits are denied until he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he is otherwise eligible. This matter is remanded to Claims to determine the amount of any overpayment and whether Mr. Swearingen will be required to repay benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/kjw