

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

JOAN M KALMERTON  
6400 S 35<sup>TH</sup> ST #3  
FRANKLIN WI 53132

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

Appeal Number: 04A-UI-03772-RT  
OC: 02-29-04 R: 12  
Claimant: Respondent (2)

**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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct  
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Access Direct Telemarketing, Inc., filed a timely appeal from an unemployment insurance decision dated March 24, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Joan M. Kalmerton. After due notice was issued, a telephone hearing was held on April 27, 2004 with the claimant participating. Aaron Johnson, Program Manager, and Casey Moon, Quality Assurance Representative, participated in the hearing for the employer. Joel Erger, Operations Supervisor, was available to testify for the employer but not called because his testimony would have been repetitive and unnecessary. The employer was represented by Suzanna Ettrich of Johnson & Associates. The administrative law judge takes

official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Employer's Exhibit 1 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 Employer's Exhibit 1, the administrative law judge finds: The claimant was employed by the employer as a full-time telephone sales representative (TSR) from September 3, 2002 until she was discharged on March 1, 2004 for failing to respond a second time to a second objection during a telephone call with a potential customer. The employer has a policy in its handbook and also in its client guidelines, both of which are written and for which the claimant received copies and of which the claimant was aware, that require that a TSR respond twice to two objections. In other words, a TSR is expected upon initiating a telephone call to do an introductory statement or "call flow" and then upon an objection make a response and upon a second objection make a second response before ending the call. The employer provides general responses to a TSR to enable them to make appropriate responses and then with experience the TSR is free to change or ad lib these responses but two responses must be made to objections. The employer routinely monitors telephone calls of each TSR to assure compliance with this rule as well as other rules. Upon a violation the TSR is given additional training or coaching to assist in the problem encountered during the monitored call.

On March 1, 2004, the claimant failed to make a response to a second objection from a potential customer. For this the claimant was discharged. On February 19, 2004, the claimant also failed to make a second response to an objection by a customer and for this the claimant got a final written warning as shown at Employer's Exhibit 1. On or about January 31, 2004, the claimant again failed to make either a first or a second response. On January 8, 2004, the claimant failed to make a second response. On previous occasions the claimant also failed to make a second response. In addition to the final written warning on February 19, 2004, the claimant received other written warnings for the same behavior as follows: a written warning on January 23, 2004; a written warning on December 8, 2003; a verbal counseling on December 1, 2003; and a written warning on February 27, 2003. Pursuant to her claim for unemployment insurance benefits filed effective February 29, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,440.00 as follows: \$240.00 per week for six weeks from benefit week ending March 6, 2004 to benefit week ending April 10, 2004.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. She is.

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 to four different occasions in less than two months where the claimant failed to make either a first or second response to a customer objection. The employer, both in its own policies and in client guidelines, requires both a response to a first objection and a response to a second objection before the telephone sales representative (TSR) can terminate a call. The claimant got a copy of each, signed an acknowledgement of each and testified that she was aware of the rule. Nevertheless the claimant failed to do so on four different occasions in less than two months. The claimant also committed such violations previously. The claimant received five different warnings for this behavior as shown at Employer's Exhibit 1, four of which occurred in the last three months of the claimant's employment.

The claimant testified that she did not remember three of the occasions in 2004 but later conceded that she probably did fail to make a first or second response in keeping with the warnings because the claimant did concede she got the warnings. Concerning the lack of a response on March 1, 2004, the claimant testified that she thought the customer had hung up but this is not credible because the employer's witness, Casey Moon, who monitored the call, testified that she continued to hear the claimant and this would have been impossible had the customer hung up. Further, if a customer hangs up it is the duty of TSR to notify the supervisor if the TSR has not had an opportunity to respond twice as required by the employer's policies.

The claimant also testified that she did not know how to make a response but the claimant conceded that she was given training in how to make these responses and when she asked for assistance the claimant conceded that she got it and the employer's witnesses testified that when a TSR violates such a policy the TSR is given coaching.

On the evidence here including the claimant's repeated failures to give a first or second response despite the repeated warnings, the administrative law judge is constrained to conclude that claimant's failures 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 a willful or wanton disregard of the employer's interests and are, at the very least, carelessness or negligence in such a degree of recurrence all as to establish disqualifying misconduct. The administrative law judge believes that what occurred here is more than mere inefficiency, unsatisfactory conduct, failure in good performance, or ordinary negligence in isolated instances. Therefore, 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.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,440.00 since separating from the employer herein on or about March 1, 2004 and filing for such benefits effective February 29, 2004, to which she is not entitled and for which she is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

#### DECISION:

The representative's decision of March 24, 2004, reference 01, is reversed. The claimant, Joan M. Kalmerton, is not entitled to receive unemployment insurance benefits until or unless she requalifies for such benefits. She has been overpaid unemployment insurance benefits in the amount of \$1,440.00.

tjc/kjf