

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MICHAEL J MURPHY**  
Claimant

**APPEAL NO. 14A-UI-11602-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MARKETLINK INC**  
**SANDY DUNN**  
Employer

**OC: 08/24/14**  
**Claimant: Respondent (2)**

Section 96.-5-2-a – Discharge  
Section 96.3-7 – Benefit Overpayment  
Section 96.6-2 – Timeliness of Appeal

**STATEMENT OF THE CASE:**

Marketlink, Inc. filed an appeal from a representative's decision dated September 11, 2014, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on December 2, 2014. Although duly notified, the claimant did not respond to the notice of hearing and did not participate. The employer participated by Ms. Shaylene Houston, Human Resource Supervisor; Ms. Sara Jones, Sales Supervisor; Ms. Dawn Ramirez, Supervisor; Mr. Larry Schultz, Call Center Manager and Mr. Robert Beeman, Senior Vice President of Operations. Employer's Exhibits A and B were admitted into evidence.

**ISSUES:**

The issues are whether the employer's appeal should be considered timely and whether the claimant was discharged for misconduct in connection with his work.

**FINDINGS OF FACT:**

A disqualification decision was mailed to the employer's last-known address of record on September 11, 2014. The employer received the decision. The decision contained a warning that the appeal must be postmarked or received by the Appeals Section by September 21, 2014. The employer appealed the adjudicator's decision on September 15, 2014 and received a positive confirmation that the facsimile had been received by Iowa Workforce Development on that date. Subsequently, the employer made an inquiry about the status of their appeal and it was determined that the appeal that had been sent via facsimile had been received but had been mis-directed in the agency. To insure that their appeal was on record, the employer re-submitted the appeal November 7, 2014. As the employer expressed its clear intent to appeal the adjudicator's determination via facsimile and the facsimile was received by the agency prior to its due date, the administrative law judge concludes that the employer's appeal is considered timely.

Having considered all of the evidence in the record, the administrative law judge finds: Michael Murphy was employed by Marketlink, Inc. from March 3, 2014 until August 19, 2014 when he was discharged from employment. Mr. Murphy was employed as a full-time assistant supervisor and was paid by the hour. His immediate supervisor was Larry Schultz.

Mr. Murphy was discharged from his employment with Marketlink, Inc. on August 19, 2014 based upon his conduct at work on August 18, 2014. On that date, Mr. Murphy reported to the employer's facility before the beginning of his afternoon work shift. At that time Mr. Murphy admitted to co-workers that he had been "drinking." After Mr. Murphy began his work shift that afternoon, the employer began to receive complaints from other workers that Mr. Murphy was intoxicated and that the claimant had made several statements to other employees that he was intoxicated. Two supervisors, Sara Jones and Dawn Ramirez, personally observed Mr. Murphy and noted that the claimant had slurred speech and food debris on himself and his surroundings. Ms. Jones spoke directly to the claimant about his behavior and although the claimant denied being drunk, he admitted consuming alcoholic drinks before and after dropping his children off at a water park that afternoon. When Ms. Ramirez attempted to speak to the claimant, he referred to Ms. Ramirez as a "bitch." Ms. Ramirez also observed the claimant slurring his speech and having food all over himself and his surroundings. This information was relayed to the call center manager. A decision was made to send Mr. Murphy home for the remainder of the day based upon the complaints from other workers, the observations of supervisory personnel and the claimant's admission that he had been drinking prior to arriving at work. Mr. Murphy did not respond to attempts to reach him at home later that day by the center manager.

When Mr. Murphy reported to work the following day on August 19, 2014, he was called to a meeting with management and the center director participated by telephone. During the August 19, 2014 meeting, Mr. Murphy was given an opportunity to explain any extenuating circumstances for his behavior the preceding day and had no explanations. At the time that Mr. Murphy had applied for employment, he indicated no medical issues that would affect his ability to perform his duties and had not indicated to the employer any medical issues affecting his ability to work prior to the incident on August 18, 2014. At the time of the claimant's job separation, the employer was not downsizing its teams and supervisors were not in jeopardy of losing their job positions. The employer does not have a drug or alcohol testing policy in place.

In his statements to Iowa Workforce Development, Mr. Murphy indicated that his slurred speech and symptoms of intoxication were caused by optical neuropathy, an ongoing condition that has the symptoms of intoxication. The claimant further asserted that Ms. Jones had coerced other employees to make negative statements about the claimant to insure that she would not lose her supervisory position with the company.

#### **REASONING AND CONCLUSIONS OF LAW:**

The question before the administrative law judge is whether the evidence in the record establishes conduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits. It does.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

In discharge cases, the employer has the burden of proof. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

In the case at hand, the claimant did not indicate any medical issues that would prevent him from performing his duties on a regular basis either at the time that he was being hired by Marketlink, Inc. or thereafter including the termination meeting that was held on August 19, 2014. Mr. Murphy did not indicate that he had any eye condition or any other malady which would prevent him from performing his duties or that would make it appear that he was intoxicated when he was not. The evidence does not establish that company supervisors had any reason to falsify statements about Mr. Murphy's conduct or that they had acted to encourage other workers to provide false statements in this matter. The evidence establishes that on August 18, 2014, that Mr. Murphy boasted of drinking alcoholic beverages before and after dropping family members off at a water park that afternoon and that the claimant boasted to other employees about his level of intoxication after reporting for work. The evidence also establishes that a number of employees independently reported that Mr. Murphy was intoxicated and complained about his conduct at work. The claimant was also personally observed by at least two supervisors who testified that Mr. Murphy's speech was slurred and that he had made references to drinking that day. Because of his conduct, the claimant was sent home for the remainder of that day. On August 19, 2014, Mr. Murphy was called to a

private room and given the opportunity by the center's director to provide any extenuating circumstances that might explain his conduct at work on August 18, 2014. Although given the opportunity to do so, Mr. Murphy offered no explanation.

Iowa Code section 730.5 provides the authority under which a private sector employer doing business in Iowa may conduct drug or alcohol testing of employees. In the present case, the employer does not utilize private sector drug or alcohol testing and the claimant's discharge was not related to a drug or alcohol test where the employer had not complied with the statutory requirements for the drug test. The employer relied upon the personal observations of supervisory personnel, other employees, the claimant's admission that he had been drinking before reporting for work and the claimant's failure to provide any reasonable excuse for his conduct although he was given the opportunity to do so.

There being no evidence in the record to the contrary, the administrative law judge concludes that the employer has sustained its burden of proof, in this case, to establish disqualifying misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. The administrative record reflects that the claimant has received unemployment insurance benefits in the amount of \$4,919.94 since filing a claim for benefits with an effective date of August 24, 2014 for the weeks ending August 30, 2014 through November 22, 2014. The administrative record also establishes the employer did participate in the fact-finding interview.

Iowa Code § 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a

continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if un rebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or

knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)“b” as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant’s separation was disqualifying, benefits were paid to which he was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based upon a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant’s employment separation if (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code section 96.3-7. In this case, the claimant received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview, the claimant is obligated to repay to the agency the benefits he received and the employer’s account shall not be charged.

**DECISION:**

The representative’s decision dated September 11, 2014, reference 01, is reversed. Claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of \$4,919.94 and is liable to repay that amount. The employer shall not be charged because the employer participated in the fact finding.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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