

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRANDON J CARRE

Claimant

APPEAL NO. 07A-UI-06447-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA

Employer

**OC: 05-27-07 R: 02
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 18, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 31, 2007. The claimant did participate along with his witness, Josh Willoughby, Overdraft Collector. The employer did participate through (representative) Christine Pace, Supervisor, and Matt Nalevanko, Supervisor. Employer's Exhibits One through Ten were entered and received into the record.

ISSUE:

Was the claimant discharged for work related misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a Collector II, full-time, beginning November 28, 2005 through May 30, 2007, when he was discharged.

The claimant was paid a bonus based upon whether he could get customers to make promises to pay on accounts that were overdrawn. The employer's policies prohibit gaming, that is noting that a promise to pay had been made by a customer on an account when the account had already been paid. Gaming is prohibited because it would reward a collector for obtaining a payment when the customer had already paid the account. The claimant admits he knew what gaming was and that gaming was prohibited. The claimant had trained other employees on the gaming policy and knew that noting a promise to pay on an account that had already had a payment was prohibited.

When the claimant was confronted at the time of his discharge with the allegation of gaming, he had no explanation for his actions during two phone calls, one on May 1 and another on May 7.

During the May 1 phone call that the employer listened to and let the claimant listen to, the customer was clearly heard telling the claimant that a deposit had already been made. The customer told the claimant this twice, yet he still noted that the customer had made a promise to pay the account. By making such a notation, the claimant was engaging in gaming. It was the beginning of a new month

and the claimant was eligible to receive a bonus for collection in the month of May that would be paid in June. Both Ms. Pace and Mr. Nalevanko listened to the tape recording of the conversation and heard the claimant ignore the customer's repeated statement that the account had already been paid.

On May 7 the claimant pretended to have a telephone conversation with another customer who had already made a ten thousand dollar payment on an account. The screen prints show that the claimant had access to the information that a payment had been made. The employer believes that the claimant acted as though he had made a call to the customer so that he could secure a promise to pay and hence increase his bonus. There was no recording of the customer, just the claimant. The phone calls before and after the one where no customer is heard were recorded correctly. The claimant engaged in a gaming on May 7, 2007.

Through a routine review, the employer discovered the two incidents of gaming on May 8. After a review and investigation by Ms. Pace, the claimant was offered the opportunity to explain the situation but had no explanation. The employer took three weeks to review the information and to get supervisor approval to discharge the claimant.

The claimant has claimed and received unemployment insurance benefits after the separation from employment.

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 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.

The claimant was engaged in gaming on two separate occasions, May 1 and May 7. The claimant's explanations offered at hearing that he did not hear one of the customers insist more than once that a payment had been made is not believable. It was the claimant's responsibility to listen to the customers, particularly when they were offering information about payments already made. Additionally, the screen prints showed that the customer had already made the payment, and that screen was available to the claimant. The claimant's explanation about the missing customer voice is similarly not believable. The claimant fabricated the conversation so that coworkers would believe he had obtained a promise to pay. A review of the screen prints associated with the May 7 call shows that the deposit had already been made and that information was known to the claimant. The claimant knew that gaming was not allowed and did engage in such conduct. His allegation that he was not eligible for a bonus is not believable in light of the employer's testimony that he would have been paid a bonus in June for work performed in May. The claimant's actions were not in the employer's or his coworkers' best interests and do constitute disqualifying misconduct. Benefits are denied.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The June 18, 2007, reference 01, decision is reversed. 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. The claimant is overpaid benefits in the amount of \$2,851.00.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/kjw