

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ERIC C SMITH**  
Claimant

**APPEAL NO. 11A-UI-14407-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CALERIS INC  
KIRSTIN HILL**  
Employer

**OC: 10/09/11  
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Caleris, Inc. filed a timely appeal from a representative's decision dated October 26, 2011, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice, a telephone hearing was held on November 16, 2011. Claimant participated personally. The employer participated by Ms. Stacy Springer, Vice-President, and Ms. Sara Baker, Manager.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

**FINDINGS OF FACT:**

Having considered all of the evidence in the record, the administrative law judge finds: Eric Smith was employed by Caleris, Inc. from July 29, 2008 until October 11, 2011 when he was discharged from employment. Mr. Smith worked as a full-time call center technical support telephone representative and was paid by the hour. His immediate supervisor was Sara Baker.

The claimant was discharged for failing to meet the company's standard of being available for "talk time" 90 percent of his work shift on October 10, 2011. Mr. Smith had been repeatedly warned about the company's expectation that he remain available to perform his telephone services the required portion of each work day. Other call center workers were able to meet the expected talk time percentage without difficulty. During October 10, 2011, the claimant was available only 72 percent of his working time to perform his "talk" services to clients. Mr. Smith received a final warning regarding talk time on September 12, 2011.

The claimant was given another final warning on October 4, 2011 for failure to report the calls that had been made on October 3, 2011 in violation of company policy. On October 5, the employer determined that Mr. Smith was spending excessive time in a "chat room" with another employee instead of performing his work duties for the company. When the claimant did not meet his expected goals on October 10, 2011, the employer reasonably concluded that the

claimant was again engaging in non-work-related activity during working hours. Claimant had previously also engaged in sending inappropriate electronic messages while at work during working hours. At the time of discharge Mr. Smith did not explain any extenuating circumstances that prevented him from being available to perform his duties of meeting the employer's expectations that day. Other workers who had begun the shift after Mr. Smith were able to do so, however.

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

The question before the administrative law judge is whether the evidence in the record is sufficient to warrant the denial of unemployment insurance benefits. It is.

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.

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 employer has the burden of proof in this matter. See Iowa Code § 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. 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).

The evidence in this case establishes that Mr. Smith had demonstrated the ability to perform the duties of his job by being available to take calls at least 90 percent of the work time that he was logged on and expected to be performing those services for his employer. Claimant, however, on numerous occasions failed to meet the employer's reasonable expectation and was not

available to take calls that required a percentage of the time that he was being paid by the company. The company contracts with client companies who expect that the call center employees who are assigned to their program will be available to receive or make calls on the client's behalf for the percentage of time each day contracted between the parties. The employer followed a reasonable course of action by repeatedly warning Mr. Smith of the company's expectations and warning him that his employment would be terminated if he did not make himself available to serve the client's interests the required percentage of each work day. After the final warning the employer determined that Mr. Smith continued to engage in extracurricular activities such as e-mailing inappropriate items and engaging in chat room conversations with other employees during working hours. The employer also determined that Mr. Smith was not following required procedures by documenting the calls that he was making at times. When the claimant's available to talk percentage was substantially lower than other employees and far below the employer's expectations on October 10, 2011, a decision was made to terminate Mr. Smith from his employment. The claimant had no explanation for his failure to meet the work standards that the employer had set. Other employees performing the same duties that day who had arrived later in the day had met or exceeded the employer's expectations.

Based upon the totality of the evidence in the record, the administrative law judge concludes that the claimant had the ability to perform his duties, that he had been adequately warned and that for reasons best known to Mr. Smith he chose not to devote the required portion of his work day to performing services on behalf of company clients and was, therefore discharged. Claimant's conduct showed a disregard for the employer's interests and standards of behavior and thus was disqualifying under the provisions of the Employment Security Law. Benefits are withheld.

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.

**DECISION:**

The representative's decision dated October 26, 2011, 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 meets all other eligibility requirements of Iowa law. The issue of whether the claimant must repay unemployment insurance benefits is remanded to the UIS Division for determination.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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