

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

ANTHONY A MARTIN  
PO BOX 14  
SCHALLER IA 51053-0014

MARKETLINK INC  
ATTN CARLA PEARSON  
4305 FLEUR DR  
DES MOINES IA 50321

Appeal Number: 06A-UI-02575-RT  
OC: 02/05/06 R: 01  
Claimant: Respondent (1)

**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, Marketlink, Inc., filed a timely appeal from an unemployment insurance decision dated February 21, 2006, reference 01, allowing unemployment insurance benefits to claimant, Anthony A. Martin. After due notice was issued, a telephone hearing was held on March 20, 2006, with the claimant participating. Steve DeVoss, Sales Manager, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time verification sales representative from January 10, 2005, until he was suspended on February 2, 2006 and then discharged on February 6, 2006. The claimant was suspended and then discharged for allegedly misusing employer time and falsification of employer records. The claimant was accused of these matters because when he had completed a telephone call he would check on the computer "sales option" and then further indicate that he was still on the call but would actually be "sitting on the record" meaning that the claimant was still shown as speaking to someone but that the claimant would not be on a phone call with anyone. The claimant did this so that he could ask questions about the transaction to others including and especially other verification sales representatives. The claimant knew that this was wrong but everyone was doing it and this process was routine usage and was told to do so by his supervisor. The claimant should have placed the system on "wrap" mode but did not do so because this might count against him when all he had to do was ask questions. Although the claimant was not aware of it, because of this usage a sale was entered for the claimant when no actual sale was made and no actual sale was entered in the computer. The employer learned of this from its corporate offices when the corporate offices checked actual sales versus sales reported for the various verification sales representatives and noted discrepancies. The claimant never received any warnings or disciplines for this behavior but sitting on the "record" or on the phone was discussed at various meetings over the last year. The claimant did not know that he would get sales from this process nor did he sit on the "record" or the phone to get sales. The claimant's hourly wage was not affected by the number of sales but the number of sales could effect merit reviews. Pursuant to his claim for unemployment insurance benefits filed effective February 5, 2006, the claimant has received unemployment insurance benefits in the amount of \$1,212.00 as follows: \$202.00 per week for six weeks from the benefit week ending February 11, 2006, to the benefit week ending March 18, 2006.

#### 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 not.
2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

The parties agree, and the administrative law judge concludes, that the claimant was suspended on February 2, 2006 and then discharged on February 6, 2006. Whenever unemployment is the result of a disciplinary layoff or suspension imposed by the employer the claimant is considered discharged. Accordingly, the administrative law judge concludes that the claimant was effectively discharged on February 2, 2006. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct.

The employer's witness, Steve DeVoss, Sales Manager, testified that the claimant was discharged for allegedly misusing employer time and falsification of employer records when, in

particular, the claimant would sit on the "record" meaning that the claimant would check "sales option" on the computer indicating that he was still on a telephone call when in fact the claimant was not talking to anyone or on a phone call. The claimant conceded that he did so but credibly testified that he did so in order to ask questions of others and in particular other verification sales representatives. The claimant chose not to use the "wrap up" process because it would count against the claimant when it was not appropriate to be counted against the claimant. The claimant knew this was wrong but everyone was doing it and he was told by his supervisor to do it and the claimant had never received any warnings or disciplines for such behavior. The administrative law judge is constrained to conclude that because of the explanations given by the claimant and the fact that everyone was doing it, that the claimant's actions were not deliberate acts constituting a material breach of his duties and obligations arising out of his worker's contract of employment nor do they evince a willful or wanton disregard of the employer's interests and are not disqualifying misconduct for those reasons. Perhaps, the claimant's actions may be negligence but the administrative law judge notes that the claimant never received any warnings or disciplines and therefore, the claimant's actions would also not be carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. It is true that the evidence establishes that occasionally over the last year at meetings the employer pointed out that sitting on a "record" or sitting on the phone was inappropriate but the administrative law judge does not believe, in view of the evidence indicating that this was common practice, that these meetings would indicate to the claimant that the behavior was wrong. At most, the evidence demonstrates that the claimant's acts were ordinary negligence in isolated instances and are not disqualifying misconduct.

In summary, and for all the reasons set out above, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant's acts were disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, the claimant is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct, to support a disqualification from unemployment insurance benefits, must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

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 \$1,212.00 since separating from the employer herein on or about February 2, 2006 and filing for such benefits effective February 5, 2006. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

**DECISION:**

The representative's decision of February 21, 2006, reference 01, is affirmed. The claimant, Anthony A. Martin, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

cs/s