

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SEAN M CUMMINGS

Claimant

SYSTEMS UNLIMITED INC

Employer

APPEAL NO. 09A-UI-09303-E2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/17/09

Claimant: Respondent (2/R)

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

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated June 23, 2009, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on July 15, 2009. Claimant participated personally. Employer participated by Mona Dowiat and Melinda Haley. Exhibits 1 and A were admitted into evidence.

ISSUE:

The issues in this matter are whether claimant was discharged for misconduct and is overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for the employer May 22, 2009. The claimant received a written warning to return e mails and voice messages within 24 hours on February 12, 2009. The claimant was required to sign an "Agreement for Continued Employment" on May 18, 2009. The employer was dissatisfied with several aspects of the claimant's work and required that the claimant agree to better performance five areas and not to discuss the document outside of the employer's complaint procedure. The employer received information that the claimant had not responded to voice messages. On May 21 the employer determined the claimant had 58 voice messages on his work voice mail system that had not been listened to. The claimant would review the phone calls on his voice messaging system to see who called but would not listen to all of the messages. The claimant had his cell phone which he used and gave that number to outside providers and staff for his contact number. The employer received a complaint from a maintenance supervisor the claimant had failed to return his calls on May 5, 8 and 20. A review of the claimant's voice mail system showed he had received the calls. The claimant admitted not returning the calls. The claimant was discharged on May 22, 2009.

REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

The claimant was required to return calls within 24 hours based upon his February warning. The employer proved the claimant had a large number of un-listened to voice mail messages. Because the voice mails can be screened to determine the caller, which the claimant testified he did, there is not evidence that the claimant did not return calls most calls within 24 hours. There is evidence the claimant did not timely return the calls of the maintenance supervisors within 24 hours on at least two occasions after his February warning. It is clear the employer was dissatisfied with the work of the claimant. The Agreement for Continued Employment showed the employer had raised his performance issues with him and he was going to be terminated if

his performance did not change. The claimant had attempted to use his cell phone as a means of avoiding his voice mail problems. The claimant however still received voice mail messages and did not answer them within the 24 hours he was required. The claimant had been warned in February about this problem.

The administrative law judge holds that the evidence has established that claimant was discharged for an act of misconduct when claimant violated the employer's policy concerning responding to calls within 24 hours. Claimant was warned concerning this policy.

The next issue concerns an overpayment of unemployment insurance benefits.

Iowa Code section 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.

This matter is remanded to claims section for determination of an overpayment.

DECISION:

The decision of the representative dated June 23, 2009, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. This matter is remanded to the claims section for determination of an overpayment.

James Elliott
Administrative Law Judge

Decision Dated and Mailed

jfe/pjs