

**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**

**MICHAEL J DELMEGE
3303 SE 22ND APT 22
DES MOINES IA 50320**

**CUMMINS GREAT PLAINS INC
c/o ADP UNEMPLOYMENT GROUP
UC EXPRESS
PO BOX 66744
ST LOUIS MO 63166-6744**

**Appeal Number: 04A-UI-08424-RT
OC: 07-04-04 R: 02
Claimant: Respondent (2)**

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, 4th 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.

(Administrative Law Judge)

(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, Cummins Great Plains, Inc., filed a timely appeal from an unemployment insurance decision dated July 26, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Michael J. Delmege. After due notice was issued, a telephone hearing was held on August 25, 2004 with the claimant participating. Donald Baldwin, Vice President of Finance, participated in the hearing for the employer. Galin Hodges, Human Resources Manager, and Daryl Steenhoek, Parts Manager, were available to testify for the employer but not called because their testimony would have been repetitive and unnecessary. Employer's Exhibits 1 through 3 were admitted into evidence. 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 person in the parts department and shipping and receiving from September 1999 until he was discharged on June 8, 2004. The claimant was discharged for fraudulent transactions. When parts were shipped to the employer and received by the employer, the parts would be short. The claimant would then prepare invoices as shown at Employer's Exhibit 2 indicating that parts had been returned by customers and credits made to the account of those customers. The customers in Employer's Exhibit 2 were fictional or phony and no such customers existed. Rather, the credits were transferred to the credit card belonging to the claimant as shown at Employer's Exhibit 1 in the column for "card number." The employer had an investigative analyst check the credit card and discovered that it was in the name of the claimant. This matter was referred to the police and the police investigation has also indicated that the claimant owned the credit card in question. A summary of these invoices and the credits thereto are shown at Employer's Exhibit 3 indicating five fictional or phony customers.

The employer became suspicious when it noticed in its monthly financials that there were some customers that only had credits to the account and no debits or purchases or charges. Further, the credit invoices did not contain original purchase invoice numbers or referrals to original purchase invoices, which was required for a credit. The employer conducted an investigation, including hiring an investigative analyst, who discovered the matters set out above. All of the credits were transferred to one credit card in the name of the claimant. When the employer learned of this, the claimant was discharged.

All of the invoices at Employer's Exhibit 2 were prepared using the computer available to the claimant. There were only two employees that had access to that computer and the other employee was on the road or gone on many of the occasions when the invoices were prepared. The customer numbers on the invoices are either for the claimant, 500609, or for the other worker, 500649. However, the other worker was not at the employer's location during many of the times when the invoices were prepared. A criminal investigation is in process but as of yet, no charges have been filed. The employer has been informed that charges will be filed against the claimant. Shortly after the claimant was discharged, he called the employer and asked if there was a way that he could make this go away or clear it up and offered to pay for the invoice charges. The employer explained that it was too late and that nothing could be done now.

Pursuant to his claim for unemployment insurance benefits filed effective July 4, 2004, the claimant has received unemployment insurance benefits in the amount of \$2,254.00 as follows: \$322.00 per week for seven weeks from benefit week ending July 17, 2004 to benefit week ending August 28, 2004. For benefit week ending July 10, 2004, the claimant reported earnings sufficient to nullify benefits.

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.

2. Whether the claimant is overpaid unemployment insurance benefits. He is.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The parties testified and the administrative law judge concludes that the claimant was discharged on July 8, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witness, Donald Baldwin, Vice President of Finance, credibly testified that after noticing in the employer's monthly financials customers with only credits and no debits or charges and for those credit invoices, no reference to original purchase invoices the employer conducted an investigation. The investigation revealed that the claimant had executed invoices for credits to fictional or phony customers as shown at Employer's Exhibit 2 and then transacted or transferred the credits to one credit card in the name of the claimant as shown at Employer's Exhibit 1. A summary of these transactions appear at Employer's Exhibit 3. The total appears to be in excess of \$15,000.00. The claimant denied

that he had done anything fraudulently or that he had done any of the invoices except for one. However, the claimant's denials are not credible. Mr. Baldwin credibly testified that these invoices were done on the claimant's computer and the claimant seemed to concede that. Mr. Baldwin testified, and the claimant also conceded, that there were only two persons that generally had access to the claimant's computer and one of those persons was out of the office on many occasions when the invoices were done. The claimant testified that he was not always at his computer but also conceded that he had never seen anyone else using his computer. Most of the invoices are in the number of the co-worker but the claimant could have put anyone's number on the invoices. Finally, the claimant testified that the credit card in question which received the credits from the invoices was not his but this is belied by the credible testimony of Mr. Baldwin. Mr. Baldwin credibly testified that both an investigative analyst and the police department informed him that the credit card belonged to the claimant. This testimony is hearsay but the administrative law judge believes that it is credible and that it is the kind of evidence that a reasonably prudent person would be accustomed to rely upon in the conduct of their business affairs. As a result, the administrative law judge concludes that the hearsay evidence is credible and reliable, and the claimant did own the credit card in question. Accordingly, the administrative law judge concludes that the claimant did commit the fraudulent transactions as alleged. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct, and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

The administrative law judge notes that there is not evidence of either a statement admitting commission of an act constituting an indictable offense or a conviction for such an act and, therefore, gross misconduct under Iowa Code Section 96.5-2-b does not apply. However, redeterminations concerning a benefit claim may be made within five years from the effective date of the claim for a gross misconduct charge under Iowa Code Section 96.5-2-b.

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 \$2,254.00 since separating from the employer herein on or about July 8, 2004 and filing for such benefits effective July 4, 2004, to which he is not entitled and for which he is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of July 26, 2004, reference 01, is reversed. The claimant, Michael J. Delmege, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. The claimant has been overpaid unemployment insurance benefits in the amount of \$2,254.00.

tjc/kjf