

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

EVAN MILLIGAN
Claimant

APPEAL NO: 13A-UI-10170-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

MARKETLINK INC
Employer

**OC: 08/11/13
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 August 30, 2013, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was scheduled and held October 2, 2013. The Agency had an incorrect phone number for the claimant and he called the Appeals Section after the record was closed. The record was reopened by order dated October 22, 2013, and another hearing was scheduled by telephone conference call before Administrative Law Judge Julie Elder on November 18, 2013. The claimant provided his phone number prior to the hearing but did not answer when called for the hearing and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Shawn Nagel, Recruitment Specialist and Larry Schultz, Center Manager, participated in the hearing on behalf of the employer. Employer's Exhibits One through Four were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time telephone sales representative for Marketlink from December 21, 2012 to August 12, 2013. He was discharged for failing to perform his job duties.

On March 30, 2013, the claimant received a formal written warning for insubordination and refusal to follow instructions (Employer's Exhibit One). The claimant was angry, loud and negative about the employer in front of co-workers on the call center floor during a verbal altercation with his supervisor (Employer's Exhibit One). He wanted a different headset and his supervisor secured one for him but he was still angry and became irate, argumentative and so loud customers could hear him. His supervisor told him to stop but he refused and was taken off the call center floor and issued a final written warning (Employer's Exhibit One).

On April 11, 2013, the claimant received a formal written warning for abandoning at least six calls of the calls monitored by the employer (Employer's Exhibit Two). After the customer answered the phone the claimant was hanging up on them and failing to pursue the call. When questioned by his supervisor about the situation the claimant admitted to the behavior and received a final written warning (Employer's Exhibit Two).

On July 29, 2013, the claimant received a formal written warning for using the employer's computer to access a personal social networking site in violation of the employer's policy prohibiting the personal use of its equipment. His actions were discovered by the Information Technology (IT) Department and his supervisor.

On August 12, 2013, the claimant's calls were monitored by Center Manager Larry Schultz. The claimant was again caught abandoning nine calls by hanging up after customers said "hello." The claimant was pulled from the call center floor and told to report to Mr. Schultz's office where he was asked if he knew why he was there. The claimant stated he did not know and Mr. Schultz told him he abandoned nine monitored calls. Mr. Schultz also reminded the claimant he was on a final warning. The claimant blamed the hang-ups on IT issues but IT can confirm whether a call is disrupted by technology or simply a hang up. Additionally, the claimant failed to do the compliance statement, required by law, on another call. After reviewing the claimant's disciplinary record the employer terminated the claimant's employment for failing to perform the duties of his job.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job 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 employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was warned about call avoidance and abandonment April 11, 2013, but despite that warning his behavior continued. On August 12, 2013, his calls were monitored by Mr. Schulz who witnessed nine abandoned or hang up calls and one incident where the claimant failed to read the required compliance statement. The claimant either knew or should have known that call avoidance violated the employer's policy as it was his job to make calls from a call center and he was previously warned about call avoidance.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

871 IAC 24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if un rebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee

with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

The claimant is overpaid benefits in the amount of \$3,990.00.

DECISION:

The August 30, 2013, 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 has received benefits but was not eligible for those benefits. The claimant is overpaid benefits in the amount of \$3,990.00.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css