

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RYAN R MURPHY
Claimant

APPEAL NO: 11A-UI-03480-S

**ADMINISTRATIVE LAW JUDGE
DECISION**

MID STATE DISTRIBUTING CO INC
Employer

**OC: 01/30/11
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct
Section 96.3-7 – Recovery of Overpayment

STATEMENT OF THE CASE:

The employer appealed a department decision dated March 9, 2011, reference 01, that held the claimant was not discharged for misconduct on January 28, 2011, and benefits are allowed. A hearing was held in Des Moines, Iowa on April 27, 2011. The claimant participated. Brad Hotchkiss, CFO; Phil Fields, National Sales Manager; and Attorney, Sharon Mulheiro, participated for the employer. Employer Exhibits 1 – 6 was received as evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with employment.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began employment on February 6, 2006, and he last worked for the employer as a full-time outside sales person on January 28, 2011. One of the regular job duties for the claimant was to submit sales calls reports. During the latter period of his employment, Sales Manager Fields repeatedly reminded claimant that he was habitually late in submitting the reports.

On January 11, 2011, the employer issued claimant a final written warning for failing to timely submit his sales calls reports. He had fallen behind about 30 days in submitting them. The claimant was instructed he needed to submit his weekly reports by the end of the day on Friday, and he needed to keep his company issued cell phone on while conducting employer business. Claimant was put on notice that any further violations of company policy his employment would be terminated.

The employer reviewed GPS reports for the period from January 17 – 21 that showed where and when the claimant had been conducting employer business calling on business clients by tracking his cell phone. The reports put into question whether claimant had made sales call on five clients according to the sales call reports he had provided to the employer. Sales Manager

Fields called several clients who were unable to verify that claimant had called upon them. One client, Spring Valley Wireless, stated that claimant could not have called upon Karen, because they have no such employee.

The employer terminated claimant on January 28, 2011 for submitting fraudulent sales call reports in light of the prior verbal and written warnings for failing to timely submit reports. The claimant contends the employer GPS tracking of his work activity is not accurate, and that he did make the calls the employer is relying upon for termination.

Claimant has been receiving unemployment benefits on his claim.

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.

The administrative law judge concludes the employer has established claimant was discharged for misconduct in connection with employment on January 28, 2011.

The employer did not rely solely on the GPS tracking reports to determine whether claimant made the stops and sales call that he submitted in his report. The employer personally called the business clients that it suspected claimant had failed to call upon based on GPS tracking. Several could not verify that claimant had stopped on the date and time he reported and one stated he could not have seen Karen because the employer has no such employee.

The claimant had been placed on a final warning due to his habitual failure to file timely sales call reports that is misconduct in light of the repeated verbal warnings that he needed to so. Claimant misrepresenting his sales activity to the employer in the week after he was warning constitutes job disqualifying misconduct.

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.

Since the claimant has been receiving benefits, the overpayment issue is remanded to Claims for a decision.

DECISION:

The department decision dated March 9, 2011, reference 01, is reversed. The claimant was discharged for misconduct on January 28, 2011. Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times his weekly benefit amount, provided the claimant is otherwise eligible. The overpayment issue is remanded.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/css