

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DRANNON L KENNY
Claimant

APPEAL NO. 08A-UI-05114-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MARKETING FOCUS INC
Employer

OC: 04/27/08 R: 03
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated May 20, 2008, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and conducted on July 28, 2008. The claimant participated personally. The employer participated by Brent Jacobson, Greg Pierce and Helen Liedel. Exhibits One through Fourteen were received into evidence.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct and whether the claimant 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: The claimant worked for this employer from October 18, 2004 until April 17, 2008 when he was discharged from employment. Mr. Kenny worked as a full-time service representative. His immediate supervisor was Brent Jacobson.

The claimant was discharged for being insubordinate to the company's vice president of operations during a telephone call that took place on or about April 17, 2008. At that time the claimant was under a performance improvement plan and was being called by Ms. Liedel because the claimant had not followed the plan by submitting reports each day as required. During the conversation with the company's operation manager, Mr. Kenny told Ms. Liedel to "Fuck off." The claimant reported his comments to Greg Pierce who was working with him. Based upon the claimant's conduct, a decision was made to terminate Mr. Kenny from his employment with the company.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Kenny was discharged for misconduct in connection with his employment. It does.

The employer bears the burden of proof in this matter. See Iowa Code section 96.6-2. The evidence in the record establishes that Mr. Kenny was under a performance improvement plan at the time of an incident on or about April 17, 2008 when he was counseled by the company's vice president of operations to follow the requirements of his performance improvement plan by submitting required documents each day. The evidence establishes that during the conversation Mr. Kenny directed a vile and inappropriate comment to the vice president of operations and confirmed his statement to another employee that day. Based upon the claimant's insubordinate conduct, a decision was made to terminate Mr. Kenny from employment. The administrative law judge concludes that the claimant's conduct was a willful disregard of the employer's interests and standards of behavior that they had a right to expect of their employees under the provisions of the Iowa Employment Security Act. The claimant's discharge was, therefore, under disqualifying conditions.

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.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law. The claimant is overpaid benefits in the amount of \$4,680.00.

DECISION:

The representative's decision dated May 20, 2008, reference 01, is hereby reversed. The claimant was discharged for misconduct. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times the claimant's weekly benefit amount, providing that he is otherwise eligible. The claimant is overpaid unemployment insurance benefits in the amount of \$4,680.00.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs