

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**AMY S APPLGATE**  
Claimant

**APPEAL NO. 12A-UI-03710-H2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BARTLETT INTERNATIONAL INC  
BARTLETT GRAIN CO**  
Employer

**OC: 02-19-12  
Claimant: Respondent (2R)**

Iowa Code §96.5(2)a – Discharge/Misconduct  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the March 29, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 25, 2012. The claimant did not participate. The claimant hung up the telephone when called to participate in the hearing. The employer did participate through (representative) Simon Buckner, Corporate Counsel and Matthew Stuever, Merchandising Manager. Employer's Exhibit One was entered and received into the record.

**ISSUES:**

Was the claimant discharged due to job connected misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a merchandiser full time beginning March 1, 2004 through February 21, 2012 when she was discharged. The claimant was discharged for failing to perform her expected job duties including answering customer telephone calls. The claimant was spending work time on personal telephone calls and was misusing the employer's instant message system. She had been warned verbally many times about the need to only use the employer's instant message system for work purposes but the record of her own sent messages clearly indicates she was using it for personal reasons. Her own instant messages also reveal that she had been disciplined for using her personal cellular telephone while at work. Two of her coworkers had the instant message system removed from their computers due to their abuse of the system. On December 20 the claimant was given a final written warning when she missed business calls to deal with her personal matters. She was warned at that time that her failure to stop using the instant message system for personal business or her failure to stop conducting her personal business on work time would lead to her discharge. When the claimant's supervisor, Mr. Stuever left the office on February 16 the claimant immediately sent

an instant message to a non-employee indicating that it was party time since he was gone. She then failed to answer business calls and instead focused on personal matters. When Mr. Stuever returned to work both of the claimant's coworkers whose computers had the instant messaging system removed, reported that the claimant had not been working while he was gone. Mr. Stuever reviewed the claimant's instant messages and discovered that she had not been working while he was gone. The claimant was discharged for not performing her required job duties and for using the employer's instant message system for unauthorized purposes.

The claimant has received unemployment benefits after the separation on a claim with an effective date of February 19, 2012.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related 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 Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. EAB*, 531 N.W.2d 645 (Iowa App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). The claimant was warned about

using the employer's instant message system for personal use but continued to do so. She was also expected to refrain from personal business during work hours but on February 16 did so anyway while Mr. Stuever was out of the office. Claimant's repeated failure to adequately and fully perform her job duties after having established the ability to do so is evidence of willful job related misconduct. Benefits are denied.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits.

**DECISION:**

The March 29, 2012 (reference 01) decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

**REMAND:**

The matter of determining the amount of the potential overpayment and whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

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Teresa K. Hillary  
Administrative Law Judge

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Decision Dated and Mailed

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