

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KARL H DOW**  
Claimant

**APPEAL NO. 13A-UI-07628-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MARKETLINK INC**  
Employer

**OC: 06/02/13**  
**Claimant: Respondent (2R)**

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

**STATEMENT OF THE CASE:**

The employer filed an appeal from a representative's decision dated June 21, 2013, reference 01, which held that the claimant was eligible for unemployment insurance benefits. After due notice, a telephone hearing was held on July 31, 2013. The claimant did not respond to the hearing and did not participate in the hearing. The employer participated by Amy MacGregor, human resources and recruitment manager. The record consists of the testimony of Amy MacGregor.

**ISSUES:**

Whether the claimant was discharged for misconduct; and  
Whether the claimant has been overpaid unemployment insurance benefits.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witness and having considered all of the evidence in the record, makes the following findings of fact:

The employer is engaged in telemarketing. The claimant was hired on April 16, 2012, as a part-time sales representative. The claimant generally worked 25 hours per week. His last day of work was May 30, 2013. He was terminated on May 30, 2013.

The claimant was terminated for what the employer says is "call avoidance." Call avoidance takes place when a customer answers the phone but the employee does not respond to the customer and codes the call as voice mail or unanswered. The employer has a written policy, of which the claimant was aware, that a formal warning is given for the first instance of call avoidance and termination results from the second instance.

The claimant was given a written warning on April 23, 2013, for not coding calls correctly and not doing the coding in a timely manner. A formal written warning was given on May 1, 2013, for call avoidance. On May 29, 2013, there were five different times the claimant avoided a call. He was terminated on May 30, 2013, in accordance with the employer's policy.

## 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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. An employer can reasonably expect that an employee will comply with all work rules and not engage in conduct that is contrary to the employer's interests. The employer has the burden of proof to show misconduct.

The claimant is not eligible for unemployment insurance benefits. The evidence showed that the claimant deliberately violated employer policies on how and when calls should be answered. The claimant had two warnings before his termination about call avoidance and not coding calls properly or in a timely manner. He knew he could be terminated for call avoidance. He was terminated after a quality assurance audit revealed he avoided five calls on May 29, 2013. The conduct was a material breach of his duty to the employer. Benefits are denied.

The next issue is overpayment of benefits.

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.

The overpayment issue is remanded to the claims section for determination.

**DECISION:**

The decision of the representative dated June 21, 2013, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. The overpayment issue is remanded to the claims section for determination.

---

Vicki L. Seeck  
Administrative Law Judge

---

Decision Dated and Mailed

vls/pjs