

**IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI**

**BRET D MCNAMARA  
103 S LINN ST  
ANAMOSA IA 52205**

**MCLEOD USA TELECOMMUNICATIONS  
SERVICES INC  
c/o JON-JAY ASSOCIATES INC  
PO BOX 182523  
COLUMBUS OH 43218-2523**

**TODD WEIMER  
ATTORNEY AT LAW  
102 N FORD ST  
PO BOX 77  
ANAMOSA IA 52205-0077**

**Appeal Number: 04A-UI-00372-RT  
OC: 11-30-03 R: 03  
Claimant: Respondent (1)**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

The employer, McLeod USA Telecommunications Services, Inc., filed a timely appeal from an unemployment insurance decision dated January 5, 2004, reference 02, allowing unemployment insurance benefits to the claimant, Bret D. McNamara. After due notice was issued, a telephone hearing was held on February 3, 2004, with the claimant participating. The claimant was represented by Todd Weimer, Attorney at Law. The employer did not participate in the hearing. Although the employer had called in a telephone number in advance of the hearing where a witness, Liz Maloney, could be reached for the hearing, when the administrative law judge called that number at 11:02 a.m., he reached the voice mail for

Ms. Maloney. The administrative law judge left a message that he was going to proceed with the hearing and if Ms. Maloney or the employer wanted to participate in the hearing, they needed to call before the hearing was over and the record was closed. The hearing began when the record was opened at 11:06 a.m. and ended when the record was closed at 11:21 a.m. and neither Ms. Maloney nor anyone else for the employer, called during that time. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

#### FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time inside sales person, small business representative, from May 5, 2003 until he was discharged on December 4, 2003 by his floor manager, Gary Perkins. The claimant was discharged solely for failing to meet sales productivity goals or quotas set by the employer. The employer has a goal that sales persons meet, including the claimant, of \$1,100.00 per month but if an employee reaches \$700.00 per month, the employee is not subject to discipline. The claimant averaged between \$300.00 and \$600.00 per month, which is below the \$700.00 quota. The claimant was supposed to make 200 contacts by phone per day or 25 per hour. The claimant was not able to do so. The claimant simply was not able to make the sales as required. The claimant followed all of the rules and procedures of the employer. The claimant received a verbal warning in July 2003 for failing to meet his sales quota; a written warning in August 2003 for failing to meet his sales quota; a probation in October 2003 for failing to meet his sales quota; and finally, in November 2003, the claimant was informed that he must meet his quota or be discharged. In November, the claimant had his highest productivity making approximately \$650.00 in sales but nevertheless the claimant was discharged. Pursuant to his claim for unemployment insurance benefits filed effective November 30, 2003, the claimant has received unemployment insurance benefits in the amount of \$1,539.00 as follows: \$171.00 per week for nine weeks from benefit week ending December 13, 2003 to benefit week ending February 7, 2004. For benefit week ending December 6, 2003, the claimant received no unemployment insurance benefits, reporting wages and vacation sufficient to nullify benefits for that week.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from the employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code Section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer failed to participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of his duties and/or evincing a willful or wanton disregard of the employer's interests and/or in carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The claimant credibly testified that he was discharged for a failure to meet the employer's sales quota. The claimant attempted to meet the sales quota but was unable to reach the sales quota. The claimant went through a series of warnings and in his last month of employment, reached his highest productivity level of \$650.00, which was only \$50.00 below the quota which would result in no further discipline, but the claimant was discharged. On the record here the administrative law judge concludes that the claimant was discharged for mere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity and this is not disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct, and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield

Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant a disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,539.00 since separating from the employer herein on or about December 4, 2003 and filing for such benefits effective November 30, 2003. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

**DECISION:**

The representative's decision of January 5, 2004, reference 02, is affirmed. The claimant, Bret D. McNamara, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

pjs/kjf