

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARK W INGHAM
Claimant

APPEAL NO. 13A-UI-06452-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GRINNELL REGIONAL MEDICAL CENTER
Employer

OC: 05/05/13
Claimant: Respondent (2-R)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 24, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 8, 2013. Claimant participated. Heidi Thompson represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and Exhibits One through 14 and A were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Mark Ingham was employed by Grinnell Regional Medical Center (GRMC) as a full-time PC Support Specialist from 2007 until May 8, 2013, when Heidi Thompson, Manager of Information Technology, discharged him from the employment. Ms. Thompson was Mr. Ingham's immediate supervisor. Mr. Ingham's main duties were to assist GRMC staff with issues related to their work computers. The duties included diagnosing and resolving computer issues. If Mr. Ingham encountered situations beyond his ability or his authority, Ms. Thompson expected Mr. Ingham to contact her or to consult with another I.T. staff member with the necessary expertise.

The final incident that triggered the discharge occurred on and after April 17, 2013, while Ms. Thompson was in Wisconsin with her husband. Corey Wilson, Directory of Pharmacy, had emailed Mr. Ingham to request computer assistance, as follows:

Mark,

My hard drive crashed last week and I lost the VPN connection stuff. Will you please help me get that re-established.

My husband, David, helped me get it installed at home last time. Would you copy him too as we go?

Thanks,

Ms. Wilson sent her message with high importance. Neither Mr. Ingham nor Ms. Wilson knew at the time that Ms. Wilson's normal method of connecting with GRMC's computer system was not by VPN, but by another Internet-based system, Citrix. Citrix would not give Ms. Wilson the degree of access to the network that she would have via a VPN connection. The VPN connection would allow Ms. Wilson's computer to become part of GRMC's network, where as the Citrix system would allow limited access via a webpage, but with no sharing of data between the machines. Mr. Wilson had assisted with setting up the employer's VPN system and understood that connection to the GRMC network via VPN provided greater access than Citrix. The list of staff with VPN access was greatly limited. Ms. Thompson usually dealt with VPN connection issues. Others in the I.T. department knew this and referred VPN issues to Ms. Thompson. During Ms. Thompson's absence in April, Mr. Ingham erroneously assumed, without checking, that Ms. Wilson, a department head, was authorized to have the VPN access.

At Ms. Wilson's request, Mr. Ingham worked with Ms. Wilson's husband to attempt to establish a VPN connection for Ms. Wilson. Mr. Wilson's involvement in connecting Ms. Wilson's computer was a violation of the employer's computer use policies, which precluded sharing of access information with unauthorized persons. Ms. Wilson had shared her access information with her husband so that he would assist her with regaining the access she had previously had to the system. Mr. Ingham knew Mr. Wilson was using Ms. Wilson's GRMC login credentials in violation of the employer's computer use policy. As a member of the I.T. department, Mr. Ingham was responsible for reporting any unauthorized computer access or unauthorized sharing of login credentials. Mr. Ingham was fully aware of that responsibility. Mr. Ingham did not report the Wilsons to Ms. Thompson. Instead, Mr. Ingham actively facilitated the violation of the computer use policy.

Another problem with Ms. Wilson's request, and Mr. Ingham's assistance, was that Ms. Wilson was trying to connect to the GRMC with a *personal* computer, not a GRMC computer. A VPN connection from a personal computer could potentially expose the GRMC network to viruses and could potentially lead to unauthorized disclosure of HIPAA protected confidential information. No such issues arose in connection with Mr. Ingham's attempt to provide Ms. Wilson with VPN access.

Mr. Ingham encountered problems with trying to establish a VPN access because Ms. Wilson was not an authorized VPN user. When Mr. Ingham spoke to a fellow I.T. staff member, Ruth Kent, Ms. Kent told Mr. Ingham that Ms. Thompson was the only one who dealt with the VPN issues. Though Mr. Ingham had Ms. Thompson's cell phone number, he did not contact Ms. Thompson for guidance. In his attempt to provide Ms. Wilson with a VPN connection, Mr. Ingham ended up running a test using the home health nurses' VPN connection authorization to see whether *any* VPN connection could be established with the Wilsons' *personal* computer. It is unclear whether the test itself exposed the GRMC network to possible attack.

Mr. Ingham eventually gave up on trying to establish a VPN connection for Ms. Wilson. Mr. Ingham entered a note to Ms. Thompson on the work ticket to document the impasse:

Corey's husband David called. He is having trouble logging in to Corey's VPN connection. I involved him in a Logmein session and was able to log in with the hhnurse but was unable to login as cwilson. Heidi is the only one who deals with VPN logins so Corey will have to wait until she returns on April 22nd.

Mr. Ingham routed the work ticket to Ms. Thompson for her review and response when she returned to work. On April 22, Ms. Thompson returned to work, reviewed the work ticket information, and was alarmed by all that had taken place in her absence. On April 24, Ms. Thompson interviewed Mr. Ingham about the events that had occurred in her absence. During that process, Mr. Ingham asserted that he had felt pressured to establish the VPN connection in light of Ms. Wilson's status as a department head. Mr. Ingham told Ms. Thompson that he had not contacted her for assistance or guidance because he thought he could handle the issue. At the time of the interview, Mr. Ingham told Ms. Thompson that he did not recall whether Mr. Wilson had Ms. Wilson's login credentials at the time Mr. Ingham worked with Mr. Wilson to try to establish the VPN connection. Ms. Thompson pointed out to Mr. Ingham that the work ticket note he had prepared for her clearly indicated that Mr. Wilson had the login credentials and that Mr. Ingham had been aware of that.

The employer had various confidentiality policies that applied to Mr. Ingham. These included policies regarding the confidentiality of patient records. Ms. Ingham was aware of these policies, along with the computer use polices, and had signed his acknowledgement of the policies at different times during the employment.

In making the decision to discharge Mr. Ingham from the employment, the employer considered an incident in November 2012, wherein Mr. Ingham misplaced one of the employer's "Air Cards," a wireless hotspot device, while his was in his possession. When asked about the missing Air Card, Mr. Ingham had told Ms. Thompson that he had brought it back. Mr. Ingham genuinely believed he had brought the device back, but had brought back the empty box instead.

Mr. Ingham's discharge occurred at a time when the employer was cutting back staff due to budget issues.

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 employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s) alone. The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

Mr. Ingham was in a somewhat unique position in the workplace. With regard to the employer's computer network and access to that network, Mr. Ingham was both troubleshooter and gatekeeper. He was the designated I.T. expert to whom other staff members were to go with their computer connection and use issues. Mr. Ingham's actions in Ms. Thompson's absence reveal Mr. Ingham to be a person confident in his abilities, not a person floundering for guidance, easily pressured, or forgetful. The administrative law judge found Mr. Ingham's professed ignorance about the nature of the VPN system and the employer's policies not credible. Mr. Ingham had assisted with setting up the VPN network.

The weight of the evidence establishes both negligence and intentional misconduct in connection with the final events that triggered the discharge. Mr. Ingham was negligent in failing to determine the type of connection Ms. Wilson previously had with the employer's network. Mr. Ingham was negligent in failing to tell Ms. Wilson that he could not work with Mr. Wilson to establish the connection, since Mr. Wilson did not have access authority. Mr. Ingham was negligent in failing to point out to Ms. Wilson that it was inappropriate to share her login authorization with her spouse. Mr. Ingham knowingly violated the employer's computer use policies by facilitating Mr. Wilson's unauthorized access to any part of the employer's computer network. Mr. Ingham was negligent in failing to heed the coworker's statement that VPN issues were to be address by Ms. Thompson. Mr. Ingham was negligent in failing to contact Ms. Thompson as part of his attempt to establish a VPN connection for Ms. Wilson. Mr. Ingham was knowingly and willfully dishonest when Ms. Thompson questioned him about whether Mr. Wilson had possessed and used Ms. Wilson's login credentials.

The weight of the evidence fails to establish that the employer's budget issues were a factor in the discharge. The employer instead considered Mr. Ingham's role in the serious potential breach of its network security, including the potential for breach of patient confidentiality.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Ingham was discharged for misconduct. Mr. Ingham is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits.

Iowa Code section 96.3(7) 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. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

DECISION:

The Agency representative's May 24, 2013, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

This matter is remanded to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs