**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**DAWN M PIEPER**
Claimant

**HARDIN COUNTY**
Employer

**APPEAL NO: 07A-UI-03229-DT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 02/25/07 R: 02**
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Dawn M. Pieper (claimant) appealed a representative's March 19, 2007 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Hardin County (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 18, 2007. The claimant participated in the hearing and was represented by Barry Kaplan, attorney at law. Nick Whitmore appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

Was the claimant discharged for work-connected misconduct?

**FINDINGS OF FACT:**

The claimant started working for the employer on June 2, 1999. She worked full time as a correctional officer in the employer's jail. Her last day of work was February 23, 2007. The employer suspended her that day and discharged her on February 27, 2007. The reason asserted for the suspension and discharge was improper use of the employer's computer.

The employer's computer and internet policy does not prohibit personal use of the employer's computer to access the internet, but only requires that the personal use be incidental, infrequent, be used reasonably, and not serve as an interference with work duties. On February 13, 2007, some of the claimant's coworkers reported to Mr. Whitmore, the jail administrator, that the claimant had used the work computer to make some postings to her "MySpace" page of a questionable nature. The postings on her site were made "to" a man whom the coworkers had concluded was on a sex offender list. Mr. Whitmore confirmed the claimant had used the work computer to view some personal sites, but his greatest concern was focused on two postings the claimant had made to her MySpace page, one on February 2 and the other on February 11, both during times the claimant was on duty. The two postings were made "to" the man who the coworkers had found on a sex offender list; the February 2 posting was a picture of the backside of a woman clothed only in a thong, looking back over her

shoulder, with the caption, “Just stopping by to say ‘hi,’” and the February 11 posting was a picture of a fully clothed man and woman standing facing each other with no physical contact, with the caption, “Wanna get dirty?”

Even though Mr. Whitmore confirmed this computer/internet use on or about February 13, the only action he took at that time was to inform the sheriff. Mr. Whitmore was preparing to be absent for a vacation, and he and the sheriff determined not to take any action or speak to the claimant until Mr. Whitmore’s return. During Mr. Whitmore’s absence the claimant continued to work and no further action was taken on the investigation. The claimant was first made aware of the issue when Mr. Whitmore returned and met with the claimant to suspend her on February 23.

The claimant had not known that the man to whom she was posting her MySpace comments was on a sexual offender list. Upon learning of this fact, she ceased any relationship and communication with him. She admitted that she had made the postings to her MySpace page, and conceded that it was likely while she was on duty. She had not received a copy of the employer’s computer/internet policy, and believed what she was doing was consistent with what others in the office were doing. She had not received any prior disciplinary action.

**REASONING AND CONCLUSIONS OF LAW:**

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant’s employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

Iowa Code § 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).

871 IAC 24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
   a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
   b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
   a. Manifest equal culpability, wrongful intent or evil design; or
   b. Show an intentional and substantial disregard of:
      1. The employer's interest, or
      2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is her usage of the employer's computer to access the internet and make the questionable postings. First, there is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). Under Greene, four days is sufficient to be "current" but eleven days is not current (without prior notification to the claimant). Here, the employer did not speak to the claimant about the matter until the eleventh day after being made aware of the problem; the only reason for the delay was

for the employer's own convenience, which is insufficient to alter the conclusion that the suspension and discharge were not for a "current" act.[1]

Further, under the evidence provided, while the two postings of greatest concern to the employer were somewhat suggestive, they do not appear to have crossed into "X-rated" territory so that the claimant should have known they were inappropriate to have posted while on duty even without being otherwise on notice of the employer's computer and internet policy. Significant to the employer's determination was the fact that the man to whom the claimant was making the postings was on a sexual offender list; however, the claimant was unaware of that fact, and there is nothing which was demonstrated to be in the employer's policy that would have put the claimant on notice that she could be in violation if she had internet contact from the employer's computer with someone with a criminal record.

While the administrative law judge agrees that it was unwise for the claimant to make the internet postings from the employer's computer, and the employer would be prudent to prohibit such usage, it does not appear that the policy in existence at the time either by its terms or in practice banned such usage. Under the circumstances of this case, even if the termination could be deemed to be for a "current act," the claimant's use of the employer's computer to make the internet postings was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, or was a good faith error in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

**DECISION:**

The representative's March 19, 2007 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

_____
Lynette A. F. Donner
Administrative Law Judge

_____
Decision Dated and Mailed

ld/pjs

[1] The administrative law judge's conclusion on this point would not be different even if simple math was used to calculate the days which elapsed between the employer's discovery of the problem and the notification of disciplinary action, i.e., February 23 - February 13 = ten days. For purposes of this decision, particularly given the reason for the delay, the administrative law judge finds that a ten-day delay is no more current than an eleven-day delay.