

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STEVEN W NOBLES

Claimant

APPEAL NO. 15A-UI-03389-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GRUNDMAN-HICKS LLC

Employer

OC: 02/15/15

Claimant: Respondent (2)

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

Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 10, 2015, reference 01, decision that that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged on February 5, 2015 for no disqualifying reason. After due notice was issued, a hearing was held on August 12, 2015. Claimant Steven Nobles notified the Appeals Bureau in writing through his attorney, Willis Hamilton, that Mr. Nobles and Mr. Hamilton were waiving their participation in the appeal hearing. Attorney John Cook, Jr., represented the employer and presented testimony through Janet Nagel, Janet Cedar, Michael Christiansen, and Deb Pruett. Exhibits One through Six and Department Exhibits D-1 and D-2 were received into evidence.

ISSUES:

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

Whether the claimant was overpaid benefits.

Whether the claimant is required to repay benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Grundman-Hicks, L.L.C., is a commercial construction contracting enterprise. Michael Christiansen is the business owner. Steven Nobles was employed by Grundman-Hicks as a full-time project manager and estimator until February 5, 2015, when Mr. Christiansen discharged him from the employment. The primary basis for the discharge was Mr. Nobles' habit of viewing sexually explicit material on his work computer despite warnings from Mr. Christiansen to discontinue the conduct or face discharge from the employment. Mr. Nobles performed his duties in an office environment. Three female staff members had to interact with

Mr. Nobles on a regular basis. Each female staff member had on multiple occasions entered Mr. Nobles' office to find Mr. Nobles viewing sexually explicit content on his work computer. On other occasions, a female staff member would enter Mr. Nobles' office for work purposes and Mr. Nobles would quickly shut down his computer. The conduct strongly suggested that Mr. Nobles had been viewing sexually explicit materials in those additional instances. At one point, accounts payable clerk Janet Cedar looked at Mr. Nobles' Internet history and noted that Mr. Nobles had visited several sexually explicit websites. On several occasions over a period of years, the female staff members complained to Mr. Christiansen about Mr. Nobles' viewing of sexually explicit content on his work computer. In response to such complaints, Mr. Christiansen would direct Mr. Nobles to cease the conduct. The conduct would then cease for a short while, after which time Mr. Nobles would once again use his work computer to download and view sexually explicit content.

The final incident that prompted Mr. Christiansen to discharge Mr. Nobles from the employment occurred on January 28, 2015, when office manager Deb Pruett entered Mr. Nobles' office and observed nude young women depicted on Mr. Nobles' computer monitor. Mr. Nobles had his back to his office door at the time. Ms. Pruett did not confront Mr. Nobles. Instead, Ms. Pruett brought the conduct to the attention of Mr. Christiansen. On February 5, Mr. Christiansen confronted Mr. Nobles about the conduct and about the history of similar conduct. Mr. Nobles did not comment.

In connection with Mr. Nobles' discharge, the employer contracted with an information technology professional to examine Mr. Nobles' work computer to recover usage data. That process recovered a copious amount of data that indicated ongoing use of the computer to view sexually explicit material. The recovered material included video depicting a couple engaged in sexual intercourse. See Exhibit Six.

In making the decision to discharge Mr. Nobles from the employment, the employer considered other job performance issues. Mr. Nobles was habitually late in submitting work the employer needed to move forward with bids and projects in a timely manner. Mr. Nobles habitually took frequent smoke breaks and long lunches, which conduct interfered with the timely submission of work.

Mr. Nobles established a claim for benefits that was effective February 15, 2015 and received \$6,240.00 in benefits for the period of February 15, 2015 through June 13, 2015.

On March 9, 2015, a Workforce Development claims deputy held a fact-finding interview to address Mr. Nobles' separation from the employment. Michael Christiansen represented the employer and provided an oral statement to the claims deputy.

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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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). 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).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The evidence in the record establishes that Mr. Nobles created a hostile, sexually harassing work environment and unreasonably violated the employer's reasonable and repeated directives to cease viewing sexually explicit material on his work computer. The conduct, which was ongoing for years, demonstrated a willful and wanton disregard of the employer's interest in

maintaining a civil and appropriate work environment. The conduct of viewing of the sexually explicit content was by itself sufficient to establish misconduct in connection with the employment that disqualifies Mr. Nobles for unemployment insurance benefits. Mr. Nobles 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 unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid \$6,240.00 in benefits for the period of February 15, 2015 through June 13, 2015. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

DECISION:

The March 10, 2015, reference 01, decision is reversed. The claimant was discharged on February 5, 2015 for misconduct in connection with the employment. 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 claimant was overpaid \$6,240.00 in benefits for the period of February 15, 2015 through June 13, 2015. The claimant must repay that amount. The employer's account is relieved of liability for benefits, including liability for benefits already paid.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css