

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRITTANY R REIMERT
Claimant

APPEAL NO. 09A-UI-06800-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**GLENN A METCALF ET AL
METCALF-THOMPSON & PHIPPS**
Employer

**Original Claim: 03/22/09
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Brittany Reimert (claimant) appealed a representative's April 22, 2009 decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits because she was discharged from work with Metcalf-Thompson & Phipps (employer) for conduct not in the best interest of the employer. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for May 28, 2009. The claimant participated personally. The employer participated by Chad Thompson, Attorney; Shirley Henderson, Tax Preparer; Kate Pratt, Legal Secretary; and Janice Thompson, Secretary.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on December 20, 2007, as a full-time legal secretary. The employer has a handbook, but the claimant did not receive it. The employer thought the claimant was spending too much work time on the internet. Sometime during the week of December 8, 2008, the employer verbally warned the claimant that she should only use the work computer to check her personal e-mail during break times. After that time, the claimant only checked her personal e-mail during break times.

Employees thought they saw pictures and instant messaging. Her supervisor walked by many times and said nothing to the claimant. The employer thought she was making mistakes because of her internet usage but did not say anything to the claimant. The claimant used Facebook for her personal e-mail. On March 20, 2009, the employer terminated the claimant

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged for misconduct.

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.

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 employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct, but that there was a final incident of misconduct that precipitated the discharge. The employer was unable to provide a first-hand witness who saw the claimant accessing anything other than her e-mail during a break time.

An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer issued the claimant a verbal warning about the issues leading to the separation. For three months after the verbal warning, the employer saw the claimant doing something it thought might be wrong and said nothing. The employer has failed to provide any evidence of

willful and deliberate misconduct that would be a final incident leading to the discharge. The claimant was discharged, but there was no misconduct.

DECISION:

The representative's April 22, 2009 decision (reference 01) is reversed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/kjw