

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DANIEL J WRIGHT
Claimant

APPEAL NO. 09A-UI-03241-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CIVCO MEDICAL INSTRUMENT CO INC
Employer

**Original Claim: 01/25/09
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Daniel J. Wright (claimant) appealed a representative's February 19, 2009 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Civco Medical Instrument Company, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 25, 2009. The claimant participated in the hearing. Melinda Fabino appeared on the employer's behalf. Based on the evidence, the arguments of the parties, a review of the law, and assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, 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 January 7, 2008. He worked full time as a second shift machine operator in the employer's manufacturing center. His last day of work was January 28, 2009. The employer discharged him on that date. The reason asserted for the discharge was alleged accessing of the employer's computer equipment for personal use after prior warning.

The claimant had been given a series of warnings in August 2008 for issues relating to a lack of productivity tied to the claimant's use of the employer's computer to access the Internet for personal business and personal phone usage. The last of the warnings was on August 14, 2008, which included a decision making day and a final warning/last chance. No other specific problems were noted from that time until January 19.

On January 19 the regular building custodian was out sick. The lead worker in the claimant's area sent him upstairs and around the building to empty out the trash cans. One of the rooms the claimant went into upstairs was a room in which there were three computers. A supervisor on rounds went past the room while the claimant was in the room. She later reported that she

saw him sitting at one of the computers with the back light from the computer screen shining on his face. As a result of the employer's conclusion that the claimant had been accessing a company computer for a personal use contrary to his final warning, the employer determined to discharge him. When confronted, the claimant denied that he had accessed the computer, but had only been reaching down to get the trash can. During the hearing under oath he maintained that he had not accessed a computer that evening. The employer did have any evidence gathered from the computer as to whether it had or had not been accessed that night and, if so, what activity occurred on the computer.

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).

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is the belief he had again used a company computer for a personal reason after prior final warning. The employer relies exclusively on the second-hand account from the shift supervisor; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether the supervisor might have been mistaken, whether she actually observed clearly, from what vantage or for what time she made her observations, or whether she is credible. The claimant under oath denied accessing the computer. No witness was available at the hearing to provide testimony to the contrary under oath and subject to cross-examination. Where, without satisfactory explanation, relevant and direct evidence within the control of a party whose interests would naturally call for its production at hearing is not produced, it may be inferred that evidence would be unfavorable. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). The administrative law judge determines that the claimant's first-hand account is more credible than the second-hand information provided by the employer. The employer has

not met its burden to establish by a preponderance of the evidence that the claimant in fact accessed the computer on January 19, and thus has not satisfied 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 February 19, 2009 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 he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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