

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SCOTT D LUFKIN
Claimant

APPEAL NO. 10A-UI-15289-VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

CEDAR FALLS LUTHERAN HOME FOR THE
Employer

**OC: 01/31/10
Claimant: Appellant (1)**

Section 96.5-2-A – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated October 29, 2010, reference 02, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on January 31, 2011, in Waterloo, Iowa. Claimant participated. Employer participated by Erin O'Neill, Controller, and Shelleene Hatch, Director of Human Resources. The employer was represented by Eric Elben, Attorney at Law. The record consists of the testimony of Erin O'Neill; the testimony of Scott Lufkin; and Employer's Exhibits 1-8.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a retirement community located in Cedar Falls, Iowa. The claimant was hired on April 7, 2010, as a full-time IT specialist. His last day of work was October 8, 2010. He was terminated on October 8, 2010.

The series of events that led to the claimant's termination began on September 15, 2010. When the claimant was hired, the employer's information technology services were provided by an outside vendor. The claimant's hire permitted the employer to transfer the services from the outside vendor to the claimant. The only function that the outside vendor retained was internet trafficking. The employer has a very strict policy regarding the use of the internet by its employees. Only work-related sites may be contacted by employees. Most employees have little or no access to the internet. The claimant had unlimited access to the internet.

On September 15, 2010, Erin O'Neill, the controller, asked the outside vendor to provide her with a list of the internet sites that were being accessed by employees. When she reviewed the list, she noticed that the claimant had been contacting gaming sites and a site that played

movies. Ms. O'Neill had a meeting with the claimant on September 16, 2010, and told him that he could not contact any gaming sites. She explained the employer's strict policy against the use of the internet for non-work-related reasons. The policy, which is written, states as follows:

All electronic and telephone communication systems are to be used primarily for business purposes, meaning that use of such equipment and systems must be job-related. Limited, occasional or incidental use of these systems for person purposes is acceptable, if done in a professional manner that does not interfere with business use.

(Exhibit 2)

Two incidents occurred after this meeting, which led to the claimant's termination. First, the claimant accessed Ms. O'Neill's computer and had an email between her and another individual sent to him. Second, another list of internet sites accessed by the claimant was provided and Ms. O'Neill believed that the claimant was still accessing non-work-related sites. This report was obtained on September 24, 2010. She met with the outside vendor to figure out how to transition from the claimant back to the outside vendor. She had made the decision to terminate the claimant but she could not do this until she was certain that the claimant could not somehow disrupt the change, due to the confidential nature of some the employer's records. The necessary changes were completed on October 8, 2010, and the claimant was terminated.

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. An employer can reasonably expect its employees to follow work rules that have been disseminated by the employer. The employer has the burden of proof to show misconduct.

The issue in this case is whether the claimant's internet usage was a violation of the employer's policy against accessing non-work-related sites. The claimant was the employer's IT specialist and he had unlimited access to the internet. The claimant testified that IT specialists frequently browse the internet during down times or when work was finished. This was a common practice and he assumed it applied in his job with this employer. The claimant acknowledged that he did contact gaming sites, in part to ask questions in the forums that are part of these sites. He also downloaded video games in order to test the video card in his laptop. He accessed sites such as Facebook and YouTube for purely personal reasons.

Although the claimant might have legitimately believed prior to September 16, 2010, that he was free to browse the internet, that belief was put to rest on September 16, 2010. Ms. O'Neill had a meeting with the claimant and told him about the employer's policy. The claimant must have realized that the policy was strict because he took steps to limit his own access to the internet. He never satisfactorily explained why he thought he could access personal sites after that meeting. He did say that he was never told he would lose his job if he continued his browsing, only that personal internet usage was "frowned upon." He knew, however, that his internet usage was being monitored and yet he continued going to sites that were not work related.

The administrative law judge concludes that the claimant elected to continue to use the internet for personal use even after he was told that such usage was prohibited. The employer had the right to restrict internet usage of its computers by its employees. The claimant knowingly violated his employer's policy. Misconduct is established. Benefits are denied.

DECISION:

The decision of the representative dated October 29, 2010, reference 02, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

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