IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ALFREDO VELARDE
Claimant

ANNETT HOLDINGS INC
TMC TRANSPORTATION INC
Employer

APPEAL NO. 07A-UI-03216-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/11/07 R: 02
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Annett Holdings, Inc./TMC Transportation, Inc. (employer) appealed a representative's March 19, 2007 decision (reference 01) that concluded Alfredo Velarde (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 16, 2007. The claimant participated in the hearing. Michelle Hawkins of TALX Employer Services appeared on the employer's behalf and presented testimony from one witness, Tom Webster. During the hearing, Employer's Exhibit One was entered into evidence. 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 July 24, 2006. He worked full time as a customer service representative in the employer's carrier management operation. His last day of work was February 9, 2007. The employer discharged him on that date. The reason asserted for the discharge was lying about the source of some email.

The employer's email policy does not outright prohibit personal use of the employer's email system, but requires that it not interfere with carrying out work duties. The claimant had a friend in Arizona who was ill and wished to be able to receive email from another friend in Arizona who would then be able to give him updates on the ill friend's health, but all or most of the emails coming from the friend were being blocked by the employer's email security system. The claimant learned from other employees that he could make a request to the employer's information technology (IT) department to have email from a blocked email source unblocked. The claimant placed a request on the IT helpdesk stating that "I have a customer that there (sic) email comes up as spam and sometimes has a hard time getting thru can you check on that," then giving the email account of his friend.

A person in IT checked the claimant's blocked emails and found there were four that had issues; two were blocked, one was marked as spam, and one was delivered. The three undelivered emails had

reference to a suggestive picture of a professional tennis player, a reference to an amusement park, and a reference to a winter barbeque. The IT person reported this to Mr. Webster, the manager, noting that the four emails did not appear to be work-related and questioning as to whether the sender was actually a customer. The IT person inferred to Mr. Webster that all four emails were from the claimant's friend's email account. However, the claimant denied that the two blocked and one spam emails were even from the friend's email account, but were from emails he had been sent by coworkers within the company; he acknowledged that the fourth email, which read, "I reply to almost every email you send but your company blocks them all!!! :-(Did you know they block emails to you?" was in fact from his friend in Arizona. The copies of the emails attached in Employer's Exhibit One are devoid of sender or source information.

When Mr. Webster confronted the claimant about his request to have some email unblocked, the claimant initially reasserted that this was for "business." When Mr. Webster questioned as to whether it was actually a customer account, the claimant acknowledged that he wanted the email unblocked so that he could get news of his ill friend. Mr. Webster would not have had an issue with that purpose, but since Mr. Webster believed that all four of the emails were from the questioned email account and none of them had to do with an ill friend, the claimant was lying. He therefore discharged the claimant.

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.

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 the conclusion that the claimant lied about email he wished to receive from a blocked account. The claimant should have been more upfront about his true reason for requesting the email to be unblocked; however, it does not appear that the true reason for wishing to be able to receive email from the friend would have been prohibited under the employer's email policy. Under the circumstances of this case, the claimant's lack of candor was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, and was a good faith error in judgment or discretion. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). 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 affirmed. 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/kjw