

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**TERESA K STERK**  
Claimant

**VERMEER MANUFACTURING  
COMPANY INC**  
Employer

**APPEAL 20A-UI-03164-S1-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 04/10/20**  
**Claimant: Respondent (2)**

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Iowa Code § 96.5-2-a – Discharge for Misconduct  
Iowa Code § 96.3-7 – Overpayment  
PL 116-136 Section 2104 (B) – Federal Pandemic Unemployment Compensation  
871 IAC 24.10 – Employer Participation in the Fact-Finding Interview

**STATEMENT OF THE CASE:**

Vermeer Manufacturing Company (employer) appealed a representative's April 10, 2020, decision (reference 01) that concluded Teresa Sterk (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 18, 2020. The claimant was represented by F. Montgomery Brown, Attorney at Law, and participated personally. Marilyn Sterk, the claimant's mother, observed the hearing. The employer was represented by Espnola Cartmill, Attorney at Law, and participated by Jill Anderson, Human Resources Manager.

The employer offered and Exhibits One, Two, Three, Five, Seven, and Nine were received into evidence. The administrative law judge took official notice of the administrative file.

**ISSUE:**

The issue includes whether the claimant was separated from employment for any disqualifying reason, whether the claimant was overpaid benefits, which party should be charged for those benefits, and whether the claimant was overpaid Federal Pandemic Unemployment Compensation.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on March 29, 2004, as a full-time engineering coordinator. She signed for receipt of the employer's handbook on May 30, 2019. The handbook had a policy that stated a worker could be issued a written warning for working on personal projects during work time. Workers could be terminated for intentional dishonesty or egregious misconduct. (Exhibit Two).

The employer's electronic communication policy stated, "Vermeer electronic communication systems are the property of Vermeer and are primarily intended to facilitate communication

among and between Vermeer team members and other contacts involved with Vermeer business. Illegal, unethical or excessive personal use of the electronic communication systems may result in disciplinary action. Vermeer electronic communications policies are not intended to conflict with the NLRA (Section 7). To ensure safety, security, quality control and protection of its property, and for training purposes, Vermeer reserves the right to monitor communications and to retrieve and read any computer files or data that are composed, sent, or received through Vermeer Internet connections or stored in Vermeer computer systems.” (Exhibit Two).

In the claimant’s work environment, most employees used the employer’s computer during lunches and breaks. Workers looked at Facebook, email, or the internet. The employer did not issue the claimant any warnings during her employment. The claimant used the company email to contact the school, her daughter’s soccer group, her lawyer and other people. Instead of using accessing the employer’s computer only during lunches and breaks during work hours, she accessed the computer at all hours of the day. The claimant remotely used the employer’s email to make non-work contacts. (Exhibit Nine).

On the morning of February 28, 2020, the employer learned the claimant was indicted, along with her mother, sister, Ankur Khemani, Gaurav Bhasin and others, in the United States District Court for the Eastern District of Tennessee at Knoxville. The employer received a copy of the indictment. The indictment alleged the claimant engaged in a scheme involving “phony technical support companies”, “faux technicians”, the sale of bogus “unneeded programs and technical support”, and the transfer of part of the payment to a co-conspirator in India. The allegations cover a time period of approximately 2014 through approximately January 2020. One tech support company in Iowa was identified as Tydan Tech. (Exhibit Five).

The employer started an investigation after the claimant left on February 28, 2020. It discovered documents and communications on the claimant’s work computer. At 11:39 a.m. on October 19, 2015, the claimant sent an email with a Vermeer logo and auto signature. It identified her as an engineering coordinator. The auto signature provided only her work telephone number and Vermeer’s address. The claimant told the receiver, “I have come up with the name Tydan tech for my llc.” (Exhibit Seven).

The employer found messages between the claimant and Ankur Khemani on the claimant’s work computer from December 7, 2013, and December 26, 2018. (Exhibit 9). The messages between the claimant and Mr. Khemani were throughout the day from 1:32 a.m. to 10:19 p.m. The claimant shows a picture of herself at work and in a non-work setting. She indicates in at least one message that she is not at work. The two discussed, among other things, activating cards to release funds. Ankur Khemani was a named co-conspirator in the federal indictment. (Exhibit Nine).

Based on the indictment and investigation, the employer was concerned. On March 2, 2020, the employer telephoned the claimant and terminated her. It sent her a follow up letter that said, “It was recently brought to our attention that you have been charged with federal crimes relating to fraud and money laundering. That conduct, which has been charged by a federal grand jury, does not align with our characteristics and behaviors and is contrary to our Code of Conduct.” (Exhibit One).

The claimant filed for unemployment insurance benefits with an effective date of March 15, 2020. The employer participated personally at the fact finding interview on March 27, 2020, by Jill Anderson. The claimant’s weekly benefit amount was determined to be \$500.00. The claimant received benefits \$500.00 per week from March 15, 2020, to the week ending May 9, 2020. This is a total of \$4,000.00 in state unemployment insurance benefits after the separation

from employment. She also received \$3,600.00 in federal pandemic unemployment compensation.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow the administrative law judge concludes the claimant was discharged for misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The claimant clearly disregarded the standards of behavior which an employer has a right to expect of its employees. The claimant's actions were volitional. She intentionally used the employer's email at all hours of the day and night for her own purposes. The employer had a right to be concerned when it found the claimant's disregard for boundaries taken to such extreme. Not only did the claimant use the employer's email, she also used their name, logo, and telephone number. The employer had reason to believe that the claimant's behavior was putting the company at risk. When a claimant intentionally disregards the standards of behavior that the employer has a right to

expect of its employees, the claimant's actions are misconduct. The claimant was discharged for misconduct.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied 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.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up

to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

The claimant has received unemployment insurance benefits that the claimant was not entitled to receive. The employer participated personally in the fact finding interview and is not chargeable. The claimant is overpaid unemployment insurance benefits.

The final issue is whether the claimant is overpaid Federal Pandemic Unemployment Compensation. The administrative law judge finds that she is overpaid those benefits.

PL116-136, Sec. 2104 provides, in pertinent part:

(b) Provisions of Agreement

(1) Federal pandemic unemployment compensation.--Any agreement under this section shall provide that the State agency of the State will make payments of regular compensation to individuals in amounts and to the extent that they would be determined if the State law of the State were applied, with respect to any week for which the individual is (disregarding this section) otherwise entitled under the State law to receive regular compensation, as if such State law had been modified in a manner such that the amount of regular compensation (including dependents' allowances) payable for any week shall be equal to

(A) the amount determined under the State law (before the application of this paragraph), plus

(B) an additional amount of \$600 (in this section referred to as "Federal Pandemic Unemployment Compensation").

....

(f) Fraud and Overpayments

(2) Repayment.-- In the case of individuals who have received amounts of Federal Pandemic Unemployment Compensation to which they were not entitled, the State shall require such individuals to repay the amounts of such Federal Pandemic Unemployment Compensation to the State agency...

The claimant has been disqualified from receiving regular unemployment insurance benefits. Accordingly, this also disqualifies claimant from receiving Federal Pandemic Unemployment

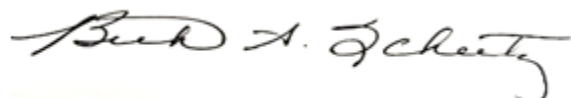
Compensation. In addition to the regular unemployment insurance benefits, the claimant received an additional \$3,600.00 in Federal Pandemic Unemployment Compensation from April 5, 2020 through May 9, 2020. The claimant is required to repay those benefits as well.

*Note to Claimant:* This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision. Individuals who do not qualify for regular unemployment insurance benefits due to disqualifying separations, but who are currently unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>.

**DECISION:**

The representative's April 10, 2020, decision (reference 01) is reversed. The claimant is not eligible to receive unemployment insurance benefits because the claimant was discharged from work for misconduct. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount provided the claimant is otherwise eligible.

The claimant is overpaid unemployment insurance benefits of \$4,000.00 from March 15, 2020 through May 9, 2020. The claimant is overpaid Federal Pandemic Unemployment Compensation of \$3,600.00 from April 5, 2020 through May 9, 2020.



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Beth A. Scheetz  
Administrative Law Judge

May 21, 2020  
Decision Dated and Mailed

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