

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: the claimant was employed by the employer as a full-time retail wireless consultant from July 2, 2001 until she was discharged on September 6, 2005. The claimant was discharged for violating the employer's policy prohibiting working on accounts of family members or friends. The employer has a policy prohibiting employees from working on the accounts of family members or friends and further providing that a violation results in discharge. This policy is found in the employer's Code of Conduct. It is also in the employer's Telephone Program policy. In April of 2005, the employer sent an email to all associates reminding them of this policy. On October 21, 2003, the claimant's manager, at the time, sent the claimant and other appropriate employees an email also informing them of the policy. It was at approximately this time when a co-worker was discharged for a violation of the policy. The claimant was aware of the employer's enforcement of this policy no later than the latter part of 2003 when this co-worker was discharged.

On January 18, 2004, the claimant renewed her father's contract or plan with the employer. The employer's records indicate the name Jina and the claimant's employee number in the records for this renewed transaction for her father. On February 8, 2005, the claimant, in effect, gave her father a \$10.00 credit when she reactivated his suspended account for non-payment, and failed to include a \$10.00 activation fee. The claimant called customer service about this and customer service told her to do it, but at no time did the claimant say she was doing this for her father, but merely told customer service she was doing it for a customer. On May 31, 2005, the claimant did an invoice for her father and gave him a loaner phone. The employer's computer records show that the claimant was the one who was logged in on the computer at the time. On July 26, 2005, the claimant took a payment from her father. The employer's records show that the claimant was logged on the computer at that time. Another employee, Melissa, worked with the claimant most of the time that the claimant was at her working location. The employer learned of these transactions by the claimant in the first week of September and, after confronting the claimant, discharged her. The claimant received no warnings or disciplines. The employer believes that the policy is clear-cut and the policy provides for a discharge upon a violation. There were no other reasons for the claimant's discharge.

Pursuant to her claim for unemployment insurance benefits filed effective September 4, 2005, the claimant has received unemployment insurance benefits in the amount of \$1,396.00 as follows: \$349.00 for benefit week ending September 10, 2005 (earnings \$80.00); \$0 benefits for benefit week ending September 17, 2005 (earnings or vacation pay \$670.00); \$349.00 for benefit week ending September 24, 2005; \$0 benefits for benefit week ending October 1, 2005 (earnings or vacation pay \$999.00); and \$349.00 per week for two weeks, from benefit week ending October 8, 2005 to benefit week ending October 15, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. She is.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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 parties agree, and the administrative law judge concludes, that the claimant was discharged on September 6, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for a current act of disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for a current act of disqualifying misconduct. The employer's witness, Larry Post, Store Manager for the employer's stores in Burlington, Keokuk, and Muscatine, Iowa, credibly testified that the claimant was discharged for a violation of the employer's policy that prohibits employees from working on accounts of family members or

friends. Mr. Post credibly testified that on January 18, 2004; February 8, 2005; May 31, 2005; and July 26, 2005; the claimant worked on her father's account. The claimant denied that she did so except on February 8, 2005 when the claimant conceded that she gave her father a credit of \$10.00, when she reactivated his account, which had been suspended for non-payment and waived the \$10.00 activation fee. The claimant testified that she called customer service and they told her to go ahead and do it. However, the claimant did not tell customer service that it was for her father, but merely said it was for a customer. The claimant attempted to use the customer service approval as an excuse to work on her father's account, but the administrative law judge disagrees. Customer service, even from the claimant's testimony, did not know that the claimant was working on her father's account. The administrative law judge further concludes that the claimant's denials that she worked on her father's account on the other occasions set out above is not credible. The claimant would testify at one point that she did not recall and then would later say she denied it and then might agree that she did it but that it was because of a check in the drop box and she did not read the name on the check. Mr. Post credibly testified from employer's records showing that the claimant was the one who worked on the account on each of those occasions either from the claimant's name and employee number or her login number on the computer.

The evidence also establishes that the employer had a clear policy prohibiting employees from working on accounts of family members or friends, which policy appears in the employer's Code of Conduct and Telephone Program policy. The claimant denies receiving any such policies but concedes that she knew of the policy and knew that the employer was "pushing" the policy when two years earlier, in late 2003, a co-worker was discharged for a violation of the policy. The evidence also establishes that the claimant was apprised of this policy by email from her own manager on October 21, 2003, which was probably in regards to the discharged employee and further another email to all associates in April of 2005. The claimant testified that she did not recall these two emails. The administrative law judge concludes that the emails were sent and the claimant was aware of them.

Because the claimant was aware of the employer's policy for approximately two years and that she was further aware that the employer was "pushing" the policy because a co-worker had been fired two years earlier, and because of the occasions set out above when the claimant dealt with her father's account, the administrative law judge is constrained to conclude that the claimant's working on her father's account on those occasions was a deliberate act constituting a material breach of her duties and obligations arising out of her workers' contract of employment and evinced a willful and wanton disregard of the employer's interest and, at the very least, was carelessness or negligence of such a degree of recurrence, as to establish disqualifying misconduct. The administrative law judge further concludes that the claimant's acts were not past acts. It is true that her discharge for disqualifying misconduct cannot be based on past acts. However, past acts can be used to determine the magnitude of the current act of misconduct. First, the administrative law judge concludes that none of the acts set out above were past acts. The evidence establishes that the employer did not learn about any of these acts until the first week of September of 2005 when it discharged the claimant. Further, the last incident on July 26, 2005, occurred just a little over one month before the claimant's discharge. Even assuming that the other acts were past acts, the administrative law judge concludes that this act on July 26, 2005 was not. Further, the administrative law judge concludes that the other acts, even if past acts, indicate that the claimant's act on July 26, 2005, was sufficiently great in magnitude to establish disqualifying misconduct. As noted above, the claimant was familiar with the employer's policy for two years because a co-worker had been discharged, but nevertheless the claimant persisted in working on her father's account even at least on one occasion that the claimant admits to.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged for a current act of disqualifying misconduct and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,396.00 since separating from the employer herein on or about September 6, 2005 and filing for such benefits effective September 4, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions Iowa law.

DECISION:

The representative's decision of September 22, 2005, reference 01, is reversed. The claimant, Jina L. Hernandez, is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct. She has been overpaid unemployment insurance benefits in the amount of \$1,396.00.

dj/kjw