BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

JACQUELINE S LATHRUM-KINNEY	:	
	:	**HEARING NUMBER:** 15B-UI-06862
Claimant	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
MCKEE AUTO CENTER INC	:	
Employer		

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Claimant, Jacqueline S. Lathrum-Kinney, worked for McKee Auto Center, Inc. from March 18, 2013 through May 28, 2015 as a full-time RV parts manager and service writer. (9:37-10:10; 1:11:54-1:12:32) Her duties consisted of ordering RV parts, closing market claims, customer service, repairing orders, finding RV service text times, and closing repairs orders. (10:19-10:43) Her schedule was Monday through Friday from 8:00 a.m. until 5:00 p.m. (10:48-11:02; 1:12:35-1:12:50) The Claimant had a computer at her desk, which was password protected. (14:13-14:23) Sometimes the RV technician, who also had access, would sit at her desk to assist her in looking up parts. (14:55-15:08) The Employer has an unwritten computer policy which provides that computers are to be used for business purposes only. (16:57-17:12)

Ms. Kinney had a habit of clocking in an hour early on weekdays (15:21-15:27), and having to work overtime on the weekends. (12:50:13:05) A normal workweek usually consisted of 40-45 hours. (1:03:54) The Employer first warned her about excessive overtime sometime during the 3rd week in May of 2015. (1:04:15-1:04:30; 1:05:09) He talked to her, again, the following week when she still had overtime,

suggesting that she reduce her hours to 45 a week, as she had been clocking in over 50. (1:03:27-1:03:46; 1:05:58-1:06:20)

The RV technician, Glen Pohl, Jr. observed the Claimant watching a movie during work hours around the end of May of 2015, and reported the incident to the Employer. (18:00-18:48; 37:03-37:10; 54:50-54:54; 56:59-59:00) The Employer later discovered that the Claimant had been accessing various websites, i.e., her Facebook page (14:31-14:40), YouTube, Amazon, Netflix, dating websites, as well as personal e-mails during work hours and during her overtime hours. (11:49-12:12:33; 13:32-14:00; 28:45-29:15; 37:40-38:00; Exhibit 2) When the Employer confronted her, she denied it. (*35:30-36:28) However, the Employer knew it was her, in part, because she was the only employee in the store an hour prior to its opening when many of these websites were accessed. (15:21-15:27)

The Claimant was issued a written warning for which she refused to sign (28:15-29:30; Exhibit 1); she was discharged for excessive personal use of the computer while on the clock. (11:25-11:37; 11:47-12:32; 1:13:05-1:13:33; Exhibits 2-3, 5-7)

(* second recording)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
>
> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665, (Iowa 2000) (quoting *Reigelsberger v. Employment Appeal Board*, 500 N.W.2d 64, 66 (Iowa 1993).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence. We attribute more weight to the Employer's version of events. Although the Employer had no written computer policy regarding computer usage, any reasonable person would know that excessive personal use on a company computer goes against the Employer's interest and could, more likely than not, lead to discipline. In this case, Ms. Kinney essentially denied most accusations regarding her online activity to websites that had nothing to do with McKee Auto Center business during work hours and alleged overtime hours. Not only did the Employer provide a credible eyewitness regarding her viewing a movie online during work hours, the Employer provided extensive corroborating documentation and testimony that she was the only employee at work before opening who accessed her work computer.

And assuming for the sake of argument that she wasn't the person on the computer, as manager, it was her responsibility to ensure that no one accessed her computer for unauthorized use. (15:35) While she may have been less culpable for inappropriate access on an infrequent basis, the fact that she allegedly had to work overtime (costing the Employer additional expense) is indicative that her personal usage far exceeded the time she needed to get her legitimate work done. The Employer needn't have a formal, written computer policy for her to know that her excessive personal usage was unauthorized, and a blatant disregard of the Employer's interests.

Lastly, the Employer gave her a verbal warning, which she obviously failed to heed, as she had additional overtime hours the following week. And even if the Employer would have continued her employment after issuing that second (but final) warning, she would have been disqualified on the basis of refusing to sign that warning. The court in *Green v. Employment Appeal Board*, 299 N.W.2d 651 (Iowa 1980) held that a claimant's refusal to sign a written warning after being told that signing was merely an acknowledgement of receipt and not an agreement of its contents was misconduct if the claimant failed to sign. Based on this record, we conclude that the Employer satisfied their burden of proving their case by a preponderance of the evidence.

DECISION:

The administrative law judge's decision dated July 21, 2005 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, she is denied benefits until such time she has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. See, Iowa Code section 96.5(2)"a".

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AMG/fnv
DATED AND MAILED:_____

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