

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**NATHANIAL A CLARK**  
Claimant

**APPEAL NO. 09A-UI-10358-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**NATIONWIDE MUTUAL INSURANCE CO**  
Employer

**OC: 06/07/09**  
**Claimant: Respondent (2-R)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the June 10, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 5, 2009. Claimant Nathaniel Clark participated. Dan Hatt, Associate Relations Specialist, represented the employer and presented additional testimony through Michelle Valesko, Manager in Information Technology Operations. Exhibits One and Two were received into evidence.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Nathaniel Clark was employed by Nationwide Mutual Insurance on a full-time basis from 1999 until June 11, 2009, when Michelle Valesko, Manager in Information Technology Operations, discharged him from the employment for excessive personal Internet use at work. From October 2007, Mr. Clark worked as a document capture technician. His duties included monitoring the employer's Internet sites and computer servers. Ms. Valesko was Mr. Clark's supervisor. Because Mr. Clark worked in Des Moines and Ms. Valesko was stationed in Columbus, Ohio, Team Lead Joel Alexander supervised Mr. Clark's work in Des Moines.

On June 8, Mr. Alexander notified Ms. Valesko that Mr. Clark was spending an excessive amount of time engaged in personal Internet use rather than performing his assigned duties. Ms. Valesko contacted Dan Hatt, Associate Relations Specialist, who had the employer's Internet security department pull records of Mr. Clark's Internet usage for the prior 60 days. The employer's records established that Mr. Clark had spent 35 hours engaged in personal Internet use during the period of May 31 through June 4, 2009. The records established that Mr. Clark engaged in personal Internet use for 11 hours on May 1, 2009 and eight hours on May 31. Mr. Clark's personal Internet usage included visits to facebook.com, Google instant message, youtube.com and hulu.com, where Mr. Clark was able to watch movies or television. The most recent personal Internet use had occurred during Mr. Clark's most recent shift on June 4, 2009.

In January 2007, the employer had issued a "One-Time Notice" to Mr. Clark concerning excessive personal Internet use and sleeping on the job. The employer warned that future violations could result in discharge from the employment.

**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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's

power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The weight of the evidence establishes excessive personal Internet use in violation of the employer's established work rules. The evidence indicates that Mr. Clark spent an extraordinary amount of time engaged in personal Internet use. Mr. Clark essentially concedes that the use was excessive, but argues that everyone was doing it. That assertion is contradicted by Mr. Alexander's report to Ms. Valesko singling out Mr. Clark's personal Internet use. The extraordinary amount of time Mr. Clark spent on the Internet engaged in non-work-related activities establishes that he could not have been furthering the employer's interests during that time. The employer's records establish that the excessive Internet usage was ongoing. Given the extraordinary amount of personal Internet use, the weight of the evidence indicates that Mr. Clark was neglecting his work duties and that the neglect was ongoing. Though the prior reprimand was remote in time, it was indeed a reprimand for the same conduct and placed Mr. Clark on warning that he could face discharge if the conduct reoccurred.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Clark was discharged for misconduct. Accordingly, Mr. Clark is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Clark.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

**DECISION:**

The Agency representative's June 10, 2009, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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