

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

SCOTT E MCKENZIE  
600 PINE ST  
MUSCATINE IA 52761

H J HEINZ CO LP  
c/o BARNETT ASSOCIATES INC  
PO BOX 7340  
GARDEN CITY NY 11530

Appeal Number: 04A-UI-04923-DT  
OC: 08/17/03 R: 04  
Claimant: Appellant (2)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Scott E. McKenzie (claimant) appealed a representative's April 22, 2004 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from H J Heinz Company L.P. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 24, 2004. The claimant participated in the hearing. Ruth Crowell appeared on the employer's behalf and presented testimony from one other witness, Jayne Hullinger. 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 August 26, 1996. He worked full time as a maintenance worker on the third shift (10:00 p.m. to 6:30 a.m.) in the employer's Muscatine, Iowa food manufacturing operation. His last day of work was March 31, 2004. The employer suspended him on April 1 and discharged him on April 12, 2004. The reason asserted for the discharge was an abuse of Internet and computer usage, resulting in excessive personal break time and theft of company time.

The employer asserted that over a period of time the claimant had shown a pattern of spending excessive time logged into a computer and that over that time various personal websites were hit by the computer. Most recently on the night of March 26 and March 27, there were hits on the computer on non-work-related Internet websites for over an hour. The employer's evidence indicated at what time a hit occurred, but could not establish how long a site was visited. The claimant acknowledged that he had occasionally accessed the personal Internet websites on the work computer, but asserted that it was for extremely limited periods of time and only during times there was no work to be done, including when there were no parts available to work on components on a repair shelf. He indicated that he did log onto the computer but that during the times he was logged onto the computer, other persons in his department who did not have their own working log-ins also used the computer. The claimant had not been given any prior warnings regarding time spent on the computer. The employer provided second-hand testimony that the claimant regularly had sat at the computer for extended periods of time; the claimant denied this allegation.

#### REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue 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 questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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 Section 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).

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).

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 assertion that he spent excessive time while on duty accessing a computer for personal reasons. However, the claimant denied that he used the computer for personal reasons to the extent asserted by the employer. The evidence presented directly by the employer was inconclusive as to who spent precisely how much time on the computer. No first-hand witness was available at the hearing to provide testimony to the contrary under oath and subject to cross-examination. The employer relies exclusively on the second-hand account from several production workers, two of which only addressed an incident in late January 2004; however, without the information being provided first-hand, the administrative law judge is unable to ascertain whether the production workers might have been mistaken, whether they actually observed the entire time, whether they are credible, or whether the employer's hearing witnesses might have misinterpreted or misunderstood aspects of the production workers' reports. Under the circumstances, the administrative law judge finds the claimant's first-hand information more

credible. While the claimant acknowledged some occasional and incidental personal use of the computer, under the circumstances of this case, the claimant's usage was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion. 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 April 22, 2004 decision (reference 01) is reversed. 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.

ld/b