IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

TIM R SPRAIN **Claimant** **HARDIN COUNTY** **SOLID WASTE DISPOSAL** **Employer**	**APPEAL 21A-UI-06553-ML-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/23/20** **Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 12, 2021, (reference 01) unemployment insurance decision that held claimant was not eligible to receive unemployment insurance benefits. The parties were properly notified of the hearing. A telephone hearing was held on April 13, 2021. The claimant, Tim Sprain, participated personally. The employer, Hardin County Solid Waste Disposal, participated through Susan Engelking. Claimant's Exhibit A was admitted.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a sorter for Hardin County Solid Waste Disposal. Claimant was employed with Hardin County Solid Waste for approximately 16 years. Hardin County Solid Waste provides solid waste disposal and recycling services for Hardin County. Claimant's job duties involved sorting the solid waste and recycling materials. Claimant worked for Hardin County Solid Waste Disposal for approximately 16 years. On or about August 17, 2020, he was discharged from employment for a violation of company policy and work rules.

Hardin County Solid Waste Disposal has a disciplinary policy located in their employee handbook. Claimant acknowledged receipt of the employee handbook on November 22, 2010. The policy lists several behaviors or actions that are unacceptable to the employer. The policy provides that engaging in one of the listed behaviors could result in disciplinary action up to and including termination of the employment relationship. Of particular relevance to this case is conduct involving the "possession or distribution of pornographic materials such as magazines, booklets, or pamphlets in the workplace."

Claimant last physically worked at Hardin Solid Waste Disposal on August 7, 2020. Claimant was on vacation from August 10, 2020 through August 15, 2020. While claimant was on vacation, Susan Engelking, the Director of Hardin Solid Waste Disposal, discovered pornographic materials in claimant's sorting area. More specifically, Ms. Engelking discovered approximately 12 pornographic videos and magazines. According to Ms. Engelking, no one had worked in claimant's sorting area between August 7, 2020, and the date in which she found the pornographic materials, or approximately August 11, 2020.

On August 17, 2020, claimant presented to Hardin Solid Waste Disposal to meet with Ms. Engelking and claimant's immediate supervisor to discuss the pornographic materials. Ms. Engelking took notes during the meeting. According to Ms. Engelking, claimant acknowledged possession of the pornographic materials in question, that it was a violation of the employee conduct and work rules policy, and that his decision to keep the materials was, "stupid." Further, when asked if the materials were gathered over time or all at once, claimant relayed that they were discovered "in a bunch," and that he had not kept everything that was in said bunch. Claimant denied making all of the above statements at the August 17, 2020, meeting. Moreover, claimant denied ever finding or possessing the pornographic materials in question.

Claimant has urged a very literal interpretation of the word possession. Through his testimony at hearing, and in his written statement found at Exhibit A, claimant has repeatedly expressed confusion as to how he could be in possession of pornographic materials found at his workplace while he was away on vacation. (Exhibit A) ("I wasn't even there so how could I have been in possession of anything?") Of course, claimant's physical possession of the materials on the date they were discovered is irrelevant to the matter at hand.

It is worth noting this is not the first instance in which pornographic materials have been found on company property. Both claimant and Ms. Engelking testified to an incident that occurred approximately 18 months prior, where a former employee had been storing pornographic materials in the workplace. Ms. Engelking disposed of the pornographic material and made it clear to her employees that possessing such material was unacceptable. No one was discharged as a result of the incident, as the employee in question had already terminated his employment relationship prior to the discovery of the materials.

Following his termination, claimant texted Ms. Engelking that there was a "bin full of porn" under a workbench that belonged to everybody, and she would have to fire his co-workers like she fired him once she found it. At the very least, this is an acknowledgment by claimant that he knew pornographic materials were present in the workplace. If there was a "bin full of porn" under a workbench, claimant had knowledge of the same and did not report the pornographic materials to his supervisors prior to his termination.

The employer asserts the discovery of the pornographic materials was not an isolated incident of misconduct for claimant. Ms. Engelking listed a number of infractions claimant had committed since 2009. In 2018 and 2019, claimant was reprimanded for smoking on government property. More specifically, claimant was reprimanded for smoking in a vehicle belonging to Hardin Solid Waste Disposal. In 2020, claimant failed to immediately report his involvement in a motor vehicle accident to his employer. His driving privileges were subsequently revoked. Lastly, claimant was discharged in August, 2020, following the discovery of pornographic materials at his workstation.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for job-related misconduct. Benefits are denied.

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

Iowa Code § 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.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r. 871-24.32(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.

Further, the employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.* When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986). Further, poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). 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 Bd.*, 616 N.W.2d 661 (Iowa 2000).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*. After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using his own common sense and experience, the Administrative Law Judge finds that Ms. Engelking's testimony is more credible than claimant's testimony.

This was not an incident of carelessness. Claimant intentionally stashed pornographic materials despite having knowledge that such an act was a violation of the employer's code of conduct. When asked if the materials were gathered over time or all at once, claimant relayed that they were discovered "in a bunch," and that he had not kept everything that was in said bunch. Claimant acknowledged the foolishness of his actions when he met with Ms. Engelking and his immediate supervisor on August 17, 2020. It is clear that claimant's actions were intentional and they were a substantial violation of the employer's policies.

Claimant's acts constitute employment misconduct because he seriously violated reasonable standards of behavior expected by the employer. The employer reasonably expected that employees not use their position to discover and retain pornographic material in the workplace. Claimant agreed to the employer's policy by a signed acknowledgement, and his knowledge of said policy was refreshed approximately 18 months prior to the current incident when other pornographic materials were discovered and discarded in the workplace. The employer has a

right to expect that an employee will not utilize its time and resources to sort through and stash pornographic materials. There is substantial evidence in the record to support the conclusion that claimant deliberately violated the employer's expectations in this case. No reasonable employee could discover a "bunch" pornographic materials, sort out which items were worth keeping, and stash the same on company property and believe that such conduct would be acceptable to the employer. Claimant's conduct would be unacceptable in most if not all employment settings. Accordingly, the employer has met its burden of proof in establishing that the claimant's conduct consisted of deliberate acts that constituted an intentional and substantial disregard of the employer's interests. These actions rise to the level of willful misconduct. As such, benefits are denied.

DECISION:

The February 12, 2021, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for job-related misconduct. Benefits are withheld in regards to this employer until such time as claimant is deemed eligible.

Michael J. Lunn
Administrative Law Judge
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April 29, 2021
Decision Dated and Mailed

mjl/ol