

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

GARY L PATRICK Claimant NORTH IOWA AREA COMMUNITY COLLEGE Employer	<div>68-0157 (9-06) - 3091078 - EI</div> <div>APPEAL NO: 10A-UI-10441-DT</div> <div>ADMINISTRATIVE LAW JUDGE DECISION</div> <div>OC: 06/13/10 Claimant: Appellant (2)</div>
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Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Gary L. Patrick (claimant) appealed a representative's July 21, 2010 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with North Iowa Area Community College (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 9, 2010. The claimant participated in the hearing and was represented by Colin Murphy, Attorney at Law. Shelly Schmit appeared on the employer's behalf. 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 April 19, 2004. He worked full time as a third shift custodian. His last day of work was June 14, 2010. The employer discharged him on that date. The reason asserted for the discharge was inappropriate use of work time.

The claimant normally worked from 12:00 a.m. until 8:00 a.m., Sunday through Thursday. On Sunday, May 30 the employer's computer system indicated that the claimant logged into a computer on 7:37 a.m. and accessed a site with sexually explicit content; an at least suggestive picture was then sent to the printer. Because of an error on the assigned printer, the computer system rerouted the print out to a printer in another building in a student computer lab, where a student found it and turned it in to the employer on June 1. On June 2 the employer contacted the claimant and informed him the matter was being investigated and could result in some disciplinary action. The claimant denied that he was the person who logged into the computer or accessed the website or sent the picture to print. However, at the time of the log in and print there was no one else who should have been in the building, and the claimant has not provided an adequate explanation as to who would have had access or his log in information at that time to present a sufficient question as to he being the person who took the action.

The employer does not have any specific policies regarding the use of its computers to access questionable or inappropriate websites. The employer did ultimately determine to discharge the claimant, which it did on June 14, but the stated basis for the discharge was not with regard to the content of the website or the picture which was printed, but was rather for “inappropriate use of work time.”

The employer had determined that the log in was at 7:37 a.m. By at least 7:50 a.m. the claimant would have returned to the custodial office to report with the first shift person who was reporting for work at 8:00 a.m., and he was done with his shift himself by 8:00 a.m. The employer could provide no further estimation as to how much time the claimant spent in “inappropriate use of work time” than the time it would have taken to log in, access the website, send the picture to print, and shut down in time to meet the next custodial worker, which could have been no more than about 15 minutes, about what he would have been able to use as break time. The employer could not establish what work the claimant normally would have been expected to accomplish that he failed to accomplish because the misspent work time. The claimant had not had any prior discipline action for any types of issues.

REASONING AND CONCLUSIONS OF LAW:

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 § 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). The question 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 matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is his “inappropriate use of work time.” As the claimant was not discharged directly because of the content of the computer access and use, and as the employer does not have policies putting employees on notice of potential discipline or discharge of an employee for accessing sexually oriented websites, the determination as to whether the claimant's “inappropriate use of work time” is disqualifying

misconduct cannot ride solely or even primarily on the content of his “inappropriate use” of his work time. While the administrative law judge agrees that the particular use of work time was inappropriate, the time misspent was minimal, and was not shown to be more than what he might have been entitled to use as a break. Under the circumstances of this case, the claimant’s misuse of the approximate 15 minutes 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 July 21, 2010 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.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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