IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JACQUELINE S LATHRUM-KINNEY Claimant	**APPEAL 15A-UI-06862-JP-T**
	ADMINISTRATIVE LAW JUDGE DECISION
MCKEE AUTO CENTER INC Employer	
	OC: 05/24/15 **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 11, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on July 17, 2015. Claimant participated. Employer participated through John Haakma, Troy Cooper, and Glen Pohl, Jr. Mr. Haakma served as the employer representative. Matthew Wetzel registered for the hearing on behalf of claimant, but did not answer his phone when contacted. Employer Exhibits One, Two, Three, Five, Six, and Seven were admitted into evidence with no objection. Employer Exhibit Four was admitted into evidence over claimant's objection. Claimant Exhibits A, C, D, and G, were admitted into evidence with no objection. Claimant Exhibits B, E, F, H, I, J, and K were admitted into evidence over the employer's objection.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a RV parts manager and service writer from March 18, 2013, and was separated from employment on May 28, 2015, when she was discharged.

Part of claimant's job duties with the employer involved her using a work computer. The employer did not have a computer use policy. The employer testified claimant's computer was password protected; however, claimant testified that her computer was not password protected at the time she was discharged. Claimant testified that other employees would use her computer from time to time. The parties both agreed that claimant could have multiple web pages accessed on her computer at the same time, through the use of tabs.

The employer discharged claimant for excessive personal use of the computer while she was clocked in at work. Employer Exhibits Two, Three, Five, and Seven shows the internet history on claimant's computer for dates and times she was clocked in at work. Employer Exhibit Six. Claimant denied using her work computer to access the dating websites in Employer Exhibits

Two, Three, Five, and Seven. Mr. Pohl, Jr. saw claimant watching a soap opera or TV show on her computer at work. Claimant would access websites (e.g., Netflix and YouTube) to have video content playing in the background to provide noise or music while she worked. The employer never gave claimant a warning regarding her computer usage at work.

The employer thought claimant was working too many extra hours and told claimant to reduce the number of hours she had been working. The employer discussed this only a few days prior to claimant's discharge. Claimant was discharged for using her work computer for personal use and working extra hours.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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:
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> 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.
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> 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 the 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.

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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). 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).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation.

The decision in this case rests, at least in part, upon the credibility of the parties. It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

The employer presented one witness that observed claimant watching a soap opera or TV show one time. The employer did not discuss this incident or any incidents regarding computer usage with claimant. Other employees had access to and used claimant's computer. Claimant also admitted to accessing Netflix and YouTube to have video content playing in the background to provide noise while she worked. The employer told claimant to reduce the number of extra hours she was working; however, claimant was not given an opportunity to reduce the number of hours she was working after Mr. Cooper discussed this with her. Employer Exhibit One. The claimant presented direct, first-hand testimony while the employer relied mainly on second-hand reports (claimant's internet history), the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). The conduct for which claimant was discharged, although recurring in nature, was merely poor judgment and inasmuch as employer had not previously warned claimant about the issues leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes

that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy, especially a policy that has not been reduced to writing, is not considered a disciplinary warning. A verbal order to reduce the number of hours being worked is not similar to personal use on a work computer and does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits.

The employer never gave claimant a warning regarding her computer usage prior to discharge. The employer did not give claimant an opportunity to reduce her hours prior to discharge. The employer has not met its burden of proof to establish disqualifying job misconduct. Benefits are allowed.

DECISION:

The June 11, 2015, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

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