

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**REGGIE MATTHES**

Claimant

**APPEAL NO. 17A-UI-02450-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**KIRKWOOD COMMUNITY COLL – AREA 1**

Employer

**OC: 01/15/17**

**Claimant: Respondent (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct  
Iowa Code Section 96.3(7) - Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the February 23, 2017, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on the claims deputy's conclusion that the claimant was discharged on January 3, 2017 for no disqualifying reason. After due notice was issued, a hearing was held on March 28, 2017. Claimant Reggie Matthes participated. Sheri Hlavacek represented the employer and presented additional testimony through Sara Swanson. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 7 into evidence.

**ISSUES:**

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

Whether Mr. Matthes has been overpaid benefits.

Whether Mr. Matthes must repay overpaid benefits.

Whether the employer's account may be charged.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Reggie Matthes was employed by Kirkwood Community College as a full-time Application Developer 1 from February 2013 until January 3, 2017, when Sara Swanson, Executive Director for Application Support and Development, Jon Neff, Vice President of Information Technology, and Sheri Hlavacek, Human Resources Supervisor, discharged him from the employment. The employer discharged Mr. Matthes from the employment after determining that Mr. Matthes was habitually spending most of his working hours engaged in non-work related computer activity, rather than working on assigned projects. Ms. Swanson became Mr. Matthes' immediate supervisor in October 2015. Mr. Matthes was a salaried professional. His work hours were supposed to be 8:00 a.m. to 5:00 p.m., Monday through Friday. Ms. Swanson allowed Mr. Matthes to work 8:30 a.m. to 4:30 p.m. as needed to assist Mr. Matthes with his parental

responsibilities. Mr. Matthes was not required to use a time clock and was instead expected to structure his breaks and work time to meet the needs of the employer. Mr. Matthes' work was computer-based. The employer issued a notebook computer for Mr. Matthes to use in the performance of his work duties.

In March 2016, Ms. Swanson verbally warned Mr. Matthes about his non-work related computer activity after she witnessed him playing video games and visiting video gaming websites during work hours, rather than performing assigned work.

On June 23, 2016, Ms. Swanson issued a written reprimand to Mr. Matthes after he failed to complete a small, but high-priority project that she had assigned 30 days earlier. On June 15, Ms. Swanson had told Mr. Matthes that Mr. Neff deemed the project high-priority and that it needed to be completed by the end of that week. Mr. Matthes concedes that the project involved a relatively small amount of work. At the time Ms. Swanson issued the reprimand, she told Mr. Matthes that she electing at that time not to involve the human resources department in the reprimand so as not to create a permanent record that would hinder Mr. Matthes' ability to later seek promotion. Ms. Swanson advised Mr. Matthes that if he resolved his productivity issues, the reprimand would go away. Mr. Matthes focused on his work during the subsequent weeks and returned to Ms. Swanson to confirm that she had observed his increased productivity. Ms. Swanson confirmed at that time that she had indeed observed Mr. Matthes' increased productivity.

By the time Ms. Swanson met with Mr. Matthes on October 5, 2016 for a performance review, Mr. Matthes' habit of expending excessive time in non-work related activities to the detriment of his work had returned. Ms. Swanson addressed the issue at the performance review meeting.

In October 2016, Ms. Swanson assigned a small project to Mr. Matthes that was within the scope of his duties and abilities. Mr. Matthes had previously received the training he needed to complete the assignment. Mr. Matthes decided he needed additional training to perform the work. Ms. Swanson had another employee work temporarily with Mr. Matthes on the assignment so that Mr. Matthes could "shadow" the coworker and refresh his skill set to tackle the assignment. Mr. Matthes decided the task was "overwhelming." Rather than taking reasonable steps to tackle the project, Mr. Matthes elected to spend much of his work time engaged in non-work relate activities. Mr. Matthes promised the project would be completed in November. Mr. Matthes then revised the expected completion date to Thanksgiving. As of January 3, 2017, Mr. Matthes had still not completed the project assigned in October 2016. Mr. Matthes' other duties did not prevent him from completing the project within a reasonable time.

In mid-December, Ms. Swanson was sufficiently concerned about Mr. Matthes' poor productivity that she began monitoring his computer use and breaks, effective December 16. Ms. Swanson remotely collected screens shots taken of Mr. Matthes computer at five-minute intervals. Ms. Swanson also began to monitor the amount of time Mr. Matthes was spending on breaks.

On Friday, December 16, Mr. Matthes spent five hours and 45 minutes at his desk. During that desk time, 22 screen shots reflected work activities, while 40 screen shots reflected non-work activities. On that day, Mr. Matthes took a 25-minute morning break, a 40-minute lunch break, and a 55-minute afternoon break. The workplace norm and expectation was that Mr. Matthes would take a 15-minute break in the morning, another 15-minute break in the afternoon, and a 30 to 45-minute lunch break. Ms. Swanson determined that only roughly one-third of Mr. Matthes' work day was spent in work-related activities.

On Monday, December 19, Mr. Matthes spent six hours and 30 minutes at his desk. During that desk time, 14 screen shots reflected work activities, while 30 screen shots reflected non-work activities. On that day, Mr. Matthes took a 25-minute morning break, and an hour for lunch.

Ms. Swanson determined that only roughly one-fourth of Mr. Matthes' work day was spent on work-related activities.

On Tuesday, December 20, Mr. Matthes spent six hours and 15 minutes at his desk. During that desk time, 18 screen shots reflected work activities, while 58 screen shots reflected non-work activities. On that day, Mr. Matthes took two morning breaks. The first was 20 minutes and the second was 15 minutes. Mr. Matthes then took a 75-minute lunch break. Ms. Swanson determined that roughly one-fourth of Mr. Matthes' work day was spent on work-related activities.

On Wednesday, December 21, Mr. Matthes spent five hours and 15 minutes at his desk. During that desk time, 15 screen shots reflected work activities, while 52 screen shots reflected non-work activities. Mr. Matthes took a 65-minute morning break, a 70-minute lunch break, and a 25-minute afternoon break. Ms. Swanson determined that roughly one-fifth of Mr. Matthes' work day was spent on work-related activities.

Thursday, December 22, 2017, was the last business day at Kirkwood before the winter break. On that day Ms. Swanson collected only a partial day of computer surveillance data before she, Mr. Neff and Ms. Hlavacek decided to discharge Mr. Matthes from the employment. For that partial day, 15 screen shots were work-related, while 20 were non-work related. The employer decided to wait until January 3, 2017 to notify Mr. Matthes of the discharge. That day would be the first business day at Kirkwood following the winter break. Mr. Matthes was off work during the winter break.

Following the discharge, Mr. Matthes established a claim for unemployment insurance benefits that was deemed effective January 15, 2017. Mr. Matthes received \$3,989.00 in benefits for the nine weeks between January 15, 2017 and March 18, 2017. Kirkwood Community College is the sole base period employer. Kirkwood is a "reimbursable" employer for unemployment insurance tax and liability purposes.

On February 22, 2017, a Workforce Development claims deputy held a fact-finding interview to address Mr. Matthes' separation from Kirkwood Community College. Ms. Swanson and Ms. Hlavacek participated in the fact-finding interview on behalf of the employer.

#### **REASONING AND CONCLUSIONS OF LAW:**

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).

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). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

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 findings of fact set forth above establish a pattern of neglecting assigned work duties, a pattern of loafing on the job, and a pattern of using the employer-issued computer for non-work related activities. Mr. Matthes knowingly and intentionally converted his work time, for which he was being paid by the employer, to leisure time. The weight of the evidence fails to support Mr. Matthes' assertion that he was overwhelmed by work in general or by a particular project. The weight of the evidence establishes that Mr. Matthes was capable of performing his assigned work duties and fully capable of being productive, but elected in bad faith to waste a prodigious amount work time on non-work related activities. The weight of the evidence fails to support Mr. Matthes' assertion that a substantial portion of his non-work related activities during December 16 through 22 were related to holiday festivities. Holiday festivities would not explain the volume of non-work related computer windows Mr. Matthes opened on his work computer during those days. The conduct, and the pattern of conduct, demonstrated an intentional and substantial disregard of the employer's interests.

The findings of fact are sufficient to establish a current act of misconduct. The pattern of misconduct continued through December 22, 2016. It was on that day that the employment made the decision to discharge Mr. Matthes from the employment. The employer's decision to delay the actual discharge until January 3, 2017, the first business day after the winter break,

did not prevent the misconduct immediately before the break from being a “current act” as of January 3, 2017.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Matthes was discharged for misconduct in connection with the employment. Accordingly, Mr. Matthes is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Matthes must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer’s account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid \$3,989.00 in benefits for the nine weeks between January 15, 2017 and March 18, 2017. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment. The employer’s account is relieved of liability for future benefits. The employer is relieved of liability for benefits already paid to the extent such relief is applicable to “reimbursable” employers.

**DECISION:**

The February 23, 2017, reference 01, decision is reversed. The claimant was discharged on January 3, 2017 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant was overpaid \$3,989.00 in benefits for the nine weeks between January 15, 2017 and March 18, 2017. The claimant must repay the benefits. The employer’s account is relieved of liability for future benefits. The employer is relieved of liability for benefits already paid to the claimant to the extent such relief is applicable to “reimbursable” employers.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs