

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BRYANT D HARKIN
Claimant

HY-VEE INC
Employer

APPEAL 19A-UI-07050-AW-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/11/19
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Claimant/appellant filed an appeal from the August 29, 2019 (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was held on September 27, 2019, at 9:00 a.m. Claimant participated. Employer participated through Trenton Kilpatrick, Hearing Representative. John Edgington, Director of Network Systems, and Max Winstead, Assistant Vice President of IT Operations, were witnesses for employer. Employer's Exhibits E1 – E35 were admitted.

ISSUE:

Whether claimant's separation was a discharge 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 as a full-time Network Systems Intern from December 28, 2018 until his employment with Hy-Vee, Inc. ended on August 8, 2019. (Winstead Testimony) Claimant's direct supervisor was John Edgington. (Winstead Testimony) Claimant's job duties included building closed-circuit television (CCTV) servers and trouble-shooting issues with the CCTV servers when tickets were issued. (Edgington Testimony)

Employer has a Hy-Vee IT Department Confidential Information Agreement which provides that access to data is based on a need-to-know basis and authority to access data must be approved by the Chief Information Officer, the Vice President of Information Technology or the Director of Information Technology Security. (Exhibit E33) The agreement further states that violation of the policy may subject employees to disciplinary action up to and including termination of employment. (Exhibit E33) Employer's company policy states that "violation of any rule, policy or procedure, whether included here, in the store level handbooks or postings, or stated orally by management personnel, will result in disciplinary action up to and including termination." (Exhibit E34) That policy is set forth in the employee handbook. (Exhibit E34) Claimant received a copy of the Hy-Vee IT Department Confidential Information Agreement and the employee handbook. (Claimant Testimony; Exhibit E35)

In February 2019, employer received a report that claimant was logging into CCTV to watch footage of one of employer's stores. (Winstead Testimony) On February 21, 2019, employer emailed employees notifying them that logging into CCTV for personal use is not allowed and that employees should only log into CCTV for loss prevention purposes. (Winstead Testimony) Claimant received the email, but did not consider it as a direct warning. (Claimant Testimony)

On August 8, 2019, an employee brought concerns to employer's human resources department about claimant's use of the company's intranet and CCTV. (Winstead Testimony) The employee reported that claimant stated he used the intranet to determine in which store a female employee worked. (Winstead Testimony) The claimant also stated that he watched the female employee on CCTV and wanted to meet her. (Winstead Testimony) Employer investigated the complaint by reviewing the CCTV logs. (Winstead Testimony) The CCTV logs indicate claimant accessed CCTV at the store in which the female employee works 615 times on August 8, 2019. (Edgington Testimony; Exhibits E5-E18) Each time an employee accesses CCTV, he must input his username and password. (Edgington Testimony) There was no ticket issued for CCTV at the store claimant was viewing. (Edgington Testimony) Claimant had no work-related reason to access CCTV on August 8, 2019. (Edgington Testimony) Claimant believes that his access of CCTV did not violate an employer policy. (Claimant Testimony)

On August 8, 2019, employer terminated claimant's employment for claimant's unauthorized access to and use of CCTV after being warned. (Winstead Testimony)

REASONING AND CONCLUSIONS OF LAW:

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

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 disqualification shall continue 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:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); accord *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

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). A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. 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. Misconduct must be substantial in nature to support a disqualification from unemployment benefits. *Gimbel v. Emp't Appeal Bd.*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992). The focus is on deliberate, intentional, or culpable acts by the employee. *Id.* Disqualification for a single misconduct incident must be a deliberate violation or disregard of standards of behavior which employer has a right to expect. *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991).

It is the duty of the administrative law judge, as the trier of fact, 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 evidence you believe; 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.*

The findings of fact show how I have resolved the disputed factual issues in this case. I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. Specifically, I find the claimant's testimony that he did not believe he was violating a company policy and that he had not been previously warned about accessing CCTV to lack credibility.

Claimant received explicit direction from employer that CCTV could not be accessed for personal use and should only be accessed for loss prevention purposes. Furthermore, claimant knew, or should have known, that his actions violated Hy-Vee's IT Department Confidential Information Agreement and company policies and would result in termination of his employment. Claimant's misuse of the employer's intranet and CCTV was a deliberate violation or disregard of standards of behavior which Hy-Vee has a right to expect from its employees. Claimant was discharged for disqualifying job-related misconduct. Benefits are denied.

DECISION:

The August 29, 2019 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged for disqualifying job-related misconduct. Benefits are denied until claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Adrienne C. Williamson
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Decision Dated and Mailed

acw/rvs