

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

CORY MACHANDE
2031 N 2ND ST
CLINTON IA 52732

SSW ENTERPRISES INC
COLLIS INC
2005 S 19TH ST
CLINTON IA 52732

Appeal Number: 04A-UI-03827-ET
OC 02-29-04 R 04
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 23, 2004, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on April 28, 2004. The claimant was not available to participate in the hearing and requested that the administrative law judge use the written statement he provided prior to the fact-finding interview. That statement was read into the record. Deb Bianchi, Human Resources Manager and Mike Gassman, Supervisor, participated in the hearing on behalf of the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time automat welder operator on the third shift for Collis Inc. from August 16, 1999 to February 18, 2004. On January 19, 2004, Supervisor Mike Gassman saw the claimant using a computer in the electricians crib to buy antique pop bottles on E-bay. Mr. Gassman questioned the claimant about whether he was allowed to use the computer and the claimant said he was and stated he was on break. The third shift was scheduled to take its first break at 1:30 a.m. and lunch at 4:10 a.m. Mr. Gassman asked Operations Manager Don Nelles about the situation the following day and Mr. Nelles stated neither the claimant nor other employees were supposed to be using the computer at any time. On January 21, 2004, Mr. Gassman again observed the claimant using a computer in the electricians crib to access E-bay and verbally warned him he was not to be on the computer. Mr. Gassman reported the situation to Mr. Nelles and on January 27, 2004, Mr. Nelles told the claimant he could not use any of the computers, "especially Dave Suski's in the electricians crib." On February 18, 2004, Supervisor Barry Huebner walked by the electricians crib at approximately 2:30 a.m. and saw the claimant using Mr. Suski's laptop. The claimant said he was printing a card. Mr. Suski had previously asked Mr. Nelles to watch for employees using his laptop because someone on the second or third shift had been using it to access the internet. Mr. Huebner instructed the claimant to return to the line. Mr. Huebner learned the claimant had told the trainer he was going to use the restroom. He did not have any work-related reason to be in the electricians crib or on the computer. Mr. Huebner called the claimant into the office and asked if he had permission to use the computer and the claimant admitted he did not. The employer terminated the claimant's employment for insubordination. The claimant indicated in his written statement that he used an electrician's personal computer during his break and had permission from the owner to do so.

The claimant has claimed and received unemployment insurance benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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 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.

871 IAC 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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Although the claimant contends he was using another employee's personal computer while on break, the employer's witnesses credibly testified the computer was company owned and the claimant left the line stating he had to use the restroom and was not on break when Mr. Huebner saw him using the computer. The claimant was previously warned not to use the computer after he was observed accessing E-bay on two occasions and that warning put the claimant on notice that the employer found his conduct unacceptable. The claimant's actions February 18, 2004, were not an isolated incident and his conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. Consequently, the administrative law judge concludes the employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Benefits are denied.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The March 23, 2004, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant is overpaid benefits in the amount of \$652.00.

je/kjf