

IOWA DEPARTMENT OF INSPECTIONS & APPEALS
Division of Administrative Hearings
Wallace State Office Building
Des Moines, Iowa 50319

Decision of the Administrative Law Judge

JASON W. KERR
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DEWITT, IOWA 52722

IOWA WORKFORCE DEVELOPMENT
INVESTIGATIONS & RECOVERY
MICHAEL WITT

IOWA WORKFORCE DEVELOPMENT
JONI BENSON
JODI DOUGLAS

Appeal Number: 16IWDUI088
OC: 11/15/15
Claimant: Appellant (1)

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 the Department. 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)

May 2, 2016

(Decision Dated & Mailed)

STATEMENT OF THE CASE

The Appellant, Jason Kerr, filed an appeal from a decision issued by Iowa Workforce Development (the Department or IWD) dated December 9, 2015 (reference 01). In this decision, IWD determined that Kerr was not eligible to receive unemployment insurance benefits. The decision stated that Kerr was discharged from work for the violation of a known company rule. Kerr's employer was IWD.

This case was transmitted from IWD to the Department of Inspections and Appeals on March 9, 2016 to schedule a contested case hearing. A notice of telephone hearing was mailed to all parties on March 10, 2016. This matter came on for hearing at the IWD office located in Davenport, Iowa on April 22, 2016. Kerr appeared with counsel, attorney Heather Carlson. Michael Witt appeared on behalf of the employer IWD.

IWD offered a packet of documents identified by page numbers 1 through 800 and Kerr offered exhibits marked A through G that were all admitted into the record. Kerr, Witt, and Judy Gilkinson testified.

ISSUES

Whether the Department correctly determined that the claimant's was disqualified from benefits because he had been discharged for misconduct; and whether the Department correctly determined the claimant is ineligible to receive unemployment insurance benefits.

FINDINGS OF FACT

Jason Kerr began his employment in IWD's Davenport, Iowa office in 2009. Approximately 40-50 individuals work in the building, including 30 state employees. Michael Witt is employed as a district manager for IWD. Part of his job duties included the direct supervision of approximately 10 employees, including Kerr. (Witt Testimony).

Kerr was employed as a Workforce Advisor. He was previously assigned to the Veteran's program as a Disabled Veterans Outreach Program (DVOP) representative. On December 13, 2013, a "Return to Work and Last Change Agreement and Release" (hereinafter "Last Chance Agreement") was executed by Kerr, the agency's Division Administrator, and an AFSCME representative to address what is only described in this record as Kerr's "inattention to job duties and resultant poor performance." The agreement provided that the terms therein expired after the duration of one year. Additionally, the agreement provided as follows:

This Agreement shall not be precedent in any pending or future dispute between the parties and shall not be admissible as evidence in any arbitration between the

parties except for matters pertaining to the employment or termination of Jason Kerr.¹

(IWD 22-23; 791-792; Witt Testimony; Kerr Testimony).

The terms of the Last Chance Agreement required Kerr to “maintain the caseload of a fulltime (1.0 FTE) Vet Rep, providing documented intensive service management to 50 Veterans at any one time.” As a part of the agreement, Kerr was obligated to address the symptoms he suffered as a result of his Post-Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI) by actively seeking appropriate medical and mental health treatment. Kerr was further obligated to follow all IWD work rules, specifically those covering an employee’s use of internet and email. Finally, the agreement warned that Kerr’s failure to follow the work rules “during the period addressed by this agreement” would result in immediate termination. (IWD 22).

Almost a year later, on August 15, 2014, Kerr’s annual performance review reflected that his job performance was deficient in several areas. Witt explained the issues with Kerr’s job performance on his annual review, in relevant part, as follows:

[T]his was a rough year. The reason for the “Not Meets” overall rating has a lot to do with your investigation of work performance and other non-work related activity involved, including and up to the “Last Chance Agreement” signed by the President of the Union, yourself and IWD leadership. And although for a short period of time after the investigation had ended, it seemed that you were moving in a more positive direction, there were still many issues with documentation in I-Works, and at least one other review of cases that also showed that struggle you were still having. Overall, it did not seem to leadership and program management, that after a Last Chance Agreement, that there was not more of and (sic) urgency and consistency to get your cases to the level that is expected, keep them there, and move forward with all other requirements of the DVOP position.
...

[Y]ou have so many talents and your ability to work with a diverse population of clients is one of the reasons why we have the success in the DVOP program. But much of the DVOP job is accounting for all the services and case management documentation, showing all the detailed work involved in managing the cases and that intense details and documentation was just not at the level expected, even after the investigation, last chance agreement and further training.

(App. A).

At the same time as Kerr’s performance review, IWD, AFSCME, and Kerr entered into a written agreement regarding his request for a reasonable accommodation. Specifically, Kerr requested to be re-assigned to a position with different job duties. As a result, IWD agreed to reassign Kerr

¹ Neither party addressed whether this language includes unemployment insurance proceedings as “pertaining to the employment or termination of Kerr.”

to the Membership/Skills. The agreement expressly provided that the previously-entered Last Chance Agreement remained in effect until December 20, 2014. (IWD 791-2).

Kerr's job duties on the Membership/Skills team included greeting IWD customers and conducting initial "triage" to refer customers to the appropriate team; providing initial eligibility assessment for DVOP services; data entry activities; basic customer service activities in-person and over the telephone; and assisting customers with their job searches. (IWD 791-2; Kerr Testimony; Witt Testimony).

According to Witt, in the following year Kerr performed his new job tasks at an acceptable level. Witt, however, began an investigation into Kerr's computer habits in July 2015 after personally observing Kerr on non-work related websites on two occasions and upon complaints received from co-workers.² Kerr was ultimately suspended with pay during the pendency of the investigation. (IWD 1-6, 800; Witt Testimony).

Through the assistance of IWD's IT Department, Witt found dozens of non-work related documents saved on IWD's server space assigned to Kerr. Most of the documents were seemingly related to Kerr's dispute with the U.S. Department of Veteran's Affairs and/or U.S. military regarding the status of his retirement from the military. Moreover, hundreds of personal emails were discovered that were sent to or from Kerr's IWD-issued email account. IWD produced almost 700 pages worth of Kerr's personal emails over the span of several years that ranged from fairly innocuous conversations with his wife regarding scheduling family medical appointments, arranging a meeting with Congressman Dave Loebsack during a family trip to Washington D.C., to securing grant money and equipment for the benefit of Kerr's privately-owned berry farm. (IWD 96-790; Witt Testimony).

Additionally, with the assistance of the IT Department, Witt discovered Kerr visited a number of internet sites not associated with his job duties while at work. Witt acknowledged that IWD employees were required to use the internet "all day, every day" to carry out their job duties. IWD submitted an itemization of every web address accessed by Kerr, but did not articulate the particular websites visited by Kerr that were not work-related. (IWD 56-95; Witt Testimony).

As a part of his investigation, Witt secured written statements from Craig Norris, Tony Rincon, Maria Gonzales, Ruby Rivera, Johnna Forbes, and Lulu Torres.³ Norris, Rivera and Rincon reported that they had not personally observed Kerr use state equipment for personal activities. Toenjes, however, reported that she witnessed Kerr use his computer to work on a personal claim with the Veterans' Administration. Additionally, Gonzales reported observing him use state computers for personal activity, and engaging in excessive personal calls during his shifts. Forbes also complained of Kerr's excessive personal calls, personal emails and extended breaks. Likewise, Torres reported observing Kerr take many personal calls during work. (IWD 41-47).

² The identities of the co-workers and their particular complaints that initiated the investigation were not disclosed in the record.

³ Many of the written statements mentioned Kerr selling blueberries to co-workers. IWD did not argue this action constituted misconduct or a violation of IWD work rules. Therefore, it will not be addressed in this opinion.

Witt met with Kerr to discuss his personal activities at work on September 3, 2015 and again on September 21, 2015. Also present during the meeting was a local union steward and IWD's operations manager. Kerr denied many of the allegations, including accessing non-work related websites on state computers. He acknowledged using his work email account for personal activities. (IWD 3, 7-19; Witt Testimony; Kerr Testimony; Gilkinson Testimony).

On November 9, 2015, Witt issued a termination letter to Kerr. The letter informed Kerr he was discharged from his employment for the violation of the following work rules as outlined in IWD Employee Handbook:

Work Performance:

- a. Deliberate and willful refusal to follow the written and oral instruction of supervisory authority, or to carry out work assignments;
- b. Negligent failure due to inability to perform assigned duties after appropriate training and instruction
- c. Failure to follow operating procedures, rules, regulations, policies and standard practices of the IWD and the divisions/bureaus;
- d. Inattention to duties, sleeping, excessive loafing, loitering, prolonged unauthorized absence from work area or malingering;
- e. Excessive personal use of smart phone, or personal devices including texting, internet surfing, shopping, personal email, Facebook, Twitter and any other use of social media unrelated to work duties during times other than authorized breaks.

Personal Action and Appearance:

- a. Lying, while in the performance of official duties, during an investigation or making false, malicious statements about other employees, supervisors, or the agency;
- b. Soliciting or selling commercial or private products or services on state time or in the performance of official duties unless approved by the Department Director or designee;

Property Use:

- a. Unauthorized, improper, malicious, or personal use of state property, materials, equipment or services such as, but not limited to, phones and cell phones;
- b. Unauthorized use of agency-provided internet access including, but not limited to, personal use such as using state-provided computers or internet access to conduct personal business, shopping, posting on personal social networking sites, personal email or internet surfing.

Outside Employment:

- a. Use of agency's time, facilities, equipment, supplies or information;
- b. Use of employee's status or position as a state employee to obtain any benefits or advantage that is not equally available to the general public or is only for the personal gain or benefit of the employee or his or her family or friends.

Kerr acknowledged his receipt of the above-referenced rules outlined in the State of Iowa Employee Handbook on November 18, 2014 and again on July 13, 2015. (IWD 20-21, 23-40; Witt Testimony).

During the course of Witt's career with IWD, he has conducted approximately a dozen similar investigations regarding an employee's excessive use of work email and the internet for personal activity. The resolutions these previous investigations ranged from no discipline at all to issuing a 5-day suspension. Witt had never terminated an employee for internet and email usage prior to Kerr. Witt asserted the termination of Kerr was proper because of Kerr's involvement in "similar activity" that lead to the parties previously-entered Last Change Agreement. Witt further argued that the sheer volume of time he spent on personal activities while at work warranted the suspension. (Witt Testimony).

Kerr denied that his personal activities during work time warranted termination. He further denied using state computers to shop or access social media sites. Kerr acknowledged he used state-owned computers to scan and email documents regarding his issues surrounding retirement from the military. He asserted that he had Witt's permission to do so. Witt, however, maintained that Kerr's activities went beyond the scope of his permission to scan a small number of documents. (IWD 7-19; Kerr Testimony; Witt Testimony).

Lastly, Kerr acknowledged that he used his work email to obtain grant money and farm equipment from certain agricultural programs for veterans. Kerr believed that in doing so, he was performing outreach activities for veterans interested in employment in the agricultural industry. (Kerr Testimony).

CONCLUSIONS OF LAW AND ANALYSIS

IWD alleged that Kerr is disqualified from receiving unemployment benefits because he was terminated from his employment for misconduct. An individual is disqualified from receiving unemployment insurance benefits if she has been discharged for misconduct in connection with employment.⁴ The employer has the burden of proving that the claimant is disqualified from receiving benefits because she was discharged for misconduct.⁵

Misconduct is a deliberate act or omission which constitutes a material breach of the employee's duties and obligations.⁶ It is limited to conduct which demonstrates willful or wanton disregard of an employer's interest, such as deliberate violation or disregard of standards of behavior that the employer has the right to expect, or recurrent careless or negligence that shows an intentional and substantial disregard of the employer's interests or the employee's obligations.⁷ Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or

⁴ Iowa Code § 96.5(2).

⁵ Iowa Code § 96.6(2).

⁶ 871 Iowa Administrative Code (IAC) 24.32(1).

⁷ *Id.*

incapacity, isolated incidents of ordinary negligence, and good faith errors in judgment are not misconduct.⁸

The parties have engaged in a lengthy dispute regarding Kerr's employment with IWD. Whether IWD's termination of Kerr was appropriate is not to be determined in this administrative proceeding. What constitutes misconduct for purposes of terminating an employee is a different determination than misconduct that warrants denial of unemployment benefits.⁹ Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits.¹⁰

It is not clear from the record the precise amount of time Kerr spent using his work computer to access non-work related websites or the number visited. It is also not clear from the record how often Kerr took extended breaks without permission, or how much time Kerr spent at work engaging in personal telephone calls. Witt acknowledged that Kerr's job performance was adequate; therefore, none of these alleged activities interfered with Kerr's ability to carry out his assigned job duties. As such, the undersigned cannot determine whether these actions constituted misconduct.

It is clear, however, that he used his work email for personal reasons a number of times. Additionally, Kerr spent an unspecified portion of his time at work, using state equipment to engage in activities related to the status of his retirement from the military. Finally, Kerr used his work email to facilitate his acquisition of grant money and farming equipment for his personal business. Although Kerr argued he did as a sort of public outreach in furtherance of his job duties, there is nothing in the record to support that his professional duties with IWD included such activity. Kerr did not have his supervisor's permission to engage in any of these activities.

IWD argued that Kerr's actions were especially egregious in light of the fact he was previously subject to the parties' Last Chance Agreement. While past acts of misconduct 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.¹¹

IWD presented almost no evidence regarding the events that lead to the parties Last Chance Agreement. Therefore, it is impossible for this undersigned to conclude that the agreement constitutes evidence of repeated actions that rose to the level of misconduct for unemployment insurance purposes.

In light of the aforementioned issues, this undersigned cannot conclude Kerr's actions constituted misconduct for the purpose of qualifying for unemployment benefits.

DECISION

⁸ *Id.*

⁹ *Gaborit v. Employment Appeal Bd.*, 743 N.W.2d 554, 558-9 (Iowa App. 2007).

¹⁰ *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

¹¹ 871 IAC 24.32(8).

Iowa Workforce Development's decision dated December 9, 2015 (reference 01) is REVERSED. The agency shall take any action necessary to implement this decision.

kmd.