

**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**

**WAYNE M WALKER
406 D AVE
ATKINS IA 52206**

**FIRST FLEET INC
202 HERITAGE PARK DR
MURFREESBORO TN 37129**

**Appeal Number: 06A-UI-00576-JTT
OC: 12/11/05 R: 03
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 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 for Misconduct

STATEMENT OF THE CASE:

Claimant Wayne Walker filed a timely appeal from the January 9, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on February 22, 2006. Mr. Walker participated. Director of Human Resources and Risk Management Debra Parsons represented the employer and presented additional testimony through Computer Network Services Manager Austin Henderson. The administrative law judge took official notice of the Agency's administrative file. During the hearing the administrative law judge ruled that the "Category Bandwidth Detail" and "User Activity Detail" documents that the employer generated on January 5, 2006, and which were part of the Agency administrative file, would not be considered because the evidence indicated that the information in those documents was not available and not considered by the employer at or before the time of discharge.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Wayne Walker was employed by First Fleet as a full-time Dispatch Officer/Office Administrator from May 24, 2004 until December 15, 2005, when fleet manager Ryan Getts discharged him.

The final incident that prompted the discharge came to the attention of the employer on December 12. On December 12, Network Services Manager Austin Henderson was performing work on the employer's computer network system. Mr. Henderson has extensive training in computer technology, has been in his position for six years and is responsible for computers at 50 facilities. Mr. Henderson has a college degree in computer engineering. Mr. Henderson has completed advanced Microsoft and Cisco training and has designed web sites. Mr. Henderson was troubleshooting the employer's computer network system on December 12 because the employer's internet filtering software program was blocking an employee from entering a website it should have allowed the employee to enter. While Mr. Henderson was addressing that problem, he accessed a computer software program that allowed him to review current internet traffic occurring over the employer's computer network. Mr. Henderson noted a number of entries that appeared to be for sexually explicit websites. Mr. Henderson noted this, in part, because the employer had installed an aggressive and expensive internet filtering software program in October 2005 to block access to such sites. Mr. Henderson noted that the terminal that was currently accessing the pornographic material was assigned to Wayne Walker.

Mr. Henderson used his computer administrator status to gain remote access to Mr. Henderson's computer so that he could see the material that would be simultaneously appearing on Mr. Walker's computer monitor. When Mr. Henderson did this, what appeared were sexually explicit photos of women in various stages of undress, some entirely nude. The photos appeared as small "thumbnail" photos at the bottom of the screen. Mr. Henderson observed as Mr. Walker enlarged the photos by clicking on the "thumbnails." The photos did not appear as "pop-ups," that is photos a person could mistakenly open by accidentally clicking on an e-mail link. Mr. Henderson determined that Mr. Walker had bypassed the employer's filtering software by first entering internet forums that were not flagged or blocked by the employer's software and then accessing the sexually explicit material through the forum. Mr. Henderson noted that Mr. Walker spent five minutes viewing the material.

Mr. Henderson's immediate supervisor was not available, so Mr. Henderson alerted Regional Manager Chris Taylor. Mr. Taylor telephoned Mr. Walker's immediate supervisor, Dispatch Manager Ryan Getts, and instructed him to immediately go to Mr. Walker's workstation. At about this time, Mr. Walker locked his computer terminal and shut his computer down, denying the employer further access and/or information regarding his activities. Mr. Walker was at his terminal.

The employer had previously been aware that Mr. Walker had accessed sexually explicit material through the employer's computer network. In response to this conduct and other problems at the employer's Cedar Rapids facility, on August 30, 2005, the employer had issued a written "Office Conduct Policy." The policy set forth eight guidelines and indicated "Abuse of the internet will not be tolerated" as the first guideline. The policy warned that failure to comply with the guidelines could result in discipline up to discharge. Mr. Walker signed his acknowledgment of the policy the same day.

The employer was aware that Mr. Walker had a side business selling "sex toys." The employer was further aware that one of its drivers had been bringing sexually explicit materials to the dispatch office and leaving them for Mr. Walker and/or others. Guideline number 8 addressed this concern as follows: "Questionable materials will not be allowed in the FirstFleet office." In other words, Mr. Walker clearly understood sexually explicit materials in any form were not allowed in the FirstFleet office.

When Mr. Henderson happened upon Mr. Walker's abuse of the internet on December 12, Mr. Walker was clearly engaged in intentionally viewing sexually explicit material on company time. Mr. Walker later asserted that he had merely been reviewing his personal e-mail messages on his "MSN Hotmail" account and that sexually explicit "pop-ups" began to take over his computer until he shut it down. If Mr. Walker was merely accessing his personal e-mail messages, he was at the same time intentionally accessing sexually explicit material through those messages. Mr. Walker's explanation does not comport with Mr. Henderson's observations on December 12, all of which indicated intentional viewing of sexually explicit material.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Walker was discharged for misconduct in connection with the employment. It does.

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 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 to 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).

The evidence in the record establishes Mr. Walker intentionally engaged in viewing sexually explicit internet material on December 12. He accessed the material by means of the employer's computer network and intentionally bypassed the employer's internet filtering software program to access the material. When Mr. Walker became aware he was being monitored, he immediately locked and shut down his terminal to prevent further monitoring. Mr. Walker had previously been warned about accessing inappropriate material on the internet. Mr. Walker's conduct was in willful and/or wanton disregard of the employer's interests.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Walker was discharged for misconduct. Accordingly, Mr. Walker is disqualified for benefits until 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 employer's account shall not be charged for benefits paid to Mr. Walker.

DECISION:

The Agency representative's decision dated January 9, 2006, reference 01, is affirmed. The claimant was discharged for misconduct. 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 allowance, provided he meets all other eligibility requirements. The employer's account shall not be charged.

jt/s