IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ASHLEE M NEUMANN
Claimant

VON MAUR INC
Employer

APPEAL NO: 14A-UI-12475-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/02/14
Claimant: Respondent (2)

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 November 25, 2014, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on December 24, 2014. The claimant participated in the hearing. Justine McIntyre, Director of Loss Prevention, and Chris Drew, Logistics Manager/previous Loss Prevention Investigator, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

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 loss prevention associate for Von Maur from March 31, 2014 to October 31, 2014. She was discharged for using the employer's computer and internet service inappropriately.

The employer's information systems (IS) department sent Loss Prevention Investigator Chris Drew a report detailing the claimant's internet usage. The report is generated by the IS Department whenever an employee's usage exceeds the employer's guidelines and uses more bandwidth than allowed. Mr. Drew brought the report to Director of Loss Prevention Justin McIntyre's attention. Loss prevention associates do not have their own work computers but can use a variety of the employer's computers. Each has a user name and password specific to her. The employer has a personal computer policy stating the computers may only be used for business purposes. The claimant signed and received that policy electronically October 1, 2014.

The employer determined the claimant spent sixteen hours and 14 minutes on social networking sites, streamed video from Netflix for eight hours and 14 minutes, and accessed her email on multiple occasions covering approximately two hours between October 17 and October 24, 2014. She spent time on Netflix, Facebook, Pinterest, AOL Mail, Shutterfly, Flash Video, and Twitter. The employer concluded the claimant was not performing her loss prevention duties while watching the employer's personal computer. She should have been monitoring cameras or, if the store was slow, the employer could have provided the claimant with reports to do. Mr. Drew relieved the claimant for her breaks after receiving the report from IS and never heard a radio on or observed her using the computer improperly when he did so but he checked her computer history to see what websites she had visited and it was blank every time he looked, leading to the conclusion she eradicated the computer's history of websites she used.

When the employer met with the claimant she admitted streaming Netflix and watching a show called "Melissa and Joey" while she worked. She stated she did not watch the show but just listened to it. Employees were allowed to listen to a radio in the two camera rooms and the loss prevention office but the claimant worked in the warehouse area where radios, cell phones, and MP3 players were not allowed. She said she may have visited Facebook once while on break but even if on break employees may only use the work computers for business purposes. The claimant admitted she knew her actions were wrong but "thought (she) would just get a written warning." The employer terminated the claimant's employment for violating the electronic communications policy and the code of conduct policy.

The claimant testified that approximately two to four weeks prior to her termination, former manager Todd Linsel told her she could listen to music in the warehouse but she knew she was not allowed to have a radio or MP3 player in the warehouse so she thought it would be okay to "listen" to a television show on Netflix. She said she started streaming "Melissa and Joey" because she was tired and it prevented her from falling asleep. She stated some of the other websites visited were work-related. At the time of termination she did not mention Todd Linsel to the employer or state he gave her permission to listen to music in the warehouse and did not say any of her activities were work-related.

The claimant has claimed and received unemployment insurance benefits since her separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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> 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.
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> 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 proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged her for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts of omissions that constitute a material breach of the worker's duties and obligations to the employer. See 871 IAC 24.32(1).

While the claimant argues she thought it was okay to stream a television situation comedy from Netflix on the employer's computer because a former manager told her she could listen to a radio, her testimony is not persuasive. Radios were allowed in the camera room or the loss prevention office but the employer did not allow employees access to radios or cell phones or MP3 players in the warehouse area where the claimant worked and which was considered a public area because other employees and contractors were around. The claimant maintains that having the television program on was the equivalent of listening to a radio but radios are not visual in nature as are television shows streamed through Netflix. Additionally, listening to the radio in an area where it is allowed does not involve violating the employer's personal computer/electronic policy. Finally, the claimant never mentioned Mr. Linsel or that he told her she could listen to music in the warehouse during her termination meeting and there was no history on the computer she was using when Mr. Drew covered her breaks after receiving the broadband usage report that resulted in the claimant's discharge.

Under these circumstances, the administrative law judge concludes the claimant's 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. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

Iowa Admin. Code r. 871-24.10 provides:

> Employer and employer representative participation in fact-finding interviews.
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> (1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.
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> (2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.
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> (3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.
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> (4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.
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> This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. In this case, the claimant has received benefits but was not eligible for those benefits. While there is no evidence the claimant received benefits due to fraud or willful misrepresentation, the employer participated in the fact-finding interview personally through the statements of Unemployment Insurance Consultant Joy Myers Consequently, the claimant's overpayment of benefits cannot be waived and she is overpaid benefits in the amount of $2660.

DECISION:

The November 25, 2014, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant has received benefits but was not eligible for those benefits. Therefore, the claimant is overpaid benefits in the amount of $2660.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

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