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

Appeal Number: 05A-UI-11225-RT
OC: 10/09/05 R: 03
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.

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(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Rockwell Collins, Inc., filed a timely appeal from an unemployment insurance decision dated October 27, 2005, reference 01, allowing unemployment insurance benefits to the claimant, William F. Barthel. After due notice was issued, a telephone hearing was held on November 16, 2005, with the claimant participating participating. The claimant was represented by Anna Rybicki, Attorney at Law. Patricia Roland, Human Resources Specialist, and Larry Bricker, Manager of Security Architecture, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

At 11:07 a.m. after the hearing had started the employer requested that that the hearing be continued so as to allow the employer to obtain an attorney. The employer wanted an attorney because the claimant had one and the employer did not know that the claimant was going to have an attorney until just before the hearing started. The administrative law judge denied the employer's request to continue hearing because, although parties are welcome to have attorneys or other representatives, it is not necessary and the administrative law judge concluded that it was not good cause for a continuance to obtain time to get the services of an attorney when the employer had time to do so prior to the hearing, especially when the motion is not made until after the hearing is started. The employer's request or motion for a continuance was denied.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer, most recently for approximately 9 months as a senior program analyst and web client server, from June 4, 1984 until he was discharged on October 13, 2005. The claimant was discharged for three reasons: viewing and keeping pornographic files and images on the employer's computer in violation of the employer's rules; conducting a business using the employer's property, namely, a laptop computer; and illegal activities in sharing multiple music files.

Concerning the first reason for the claimant's discharge, viewing and having pornographic files on the employer's computer, the employer discovered between 12 and 24 pornographic images on the claimant's computer, both from a "p" drive, which could be either internal or external, but was probably internal, and a "c" drive, which is internal. The images consisted of individuals engaged in sexual acts, which images were explicit, and images containing nudity. The files containing these pornographic images were created using the claimant's login identification and password. The employer learned of this as a result of an investigation of the claimant's computer and computer use. The employer has a policy, RC-EB-POL002 which prohibits derogatory or offensive or pornographic material being used on the employer's computer or using the computer in any way that would embarrass the employer, including prohibiting using the employer's computer for other than business purposes except for occasional personal use that would not interfere with the employer's business. There is also a similar message that appears on the computer screen when a computer is first turned on. The claimant was aware of the policy and of the notice that appears on the computer screen. The claimant did not give his login identification or password to anyone else nor did he have any evidence that anyone else had his login identification or password. It is impossible for anyone to enter materials on the claimant's computer, at least for an internal drive, unless perhaps done by the network from someone who would know or have access to the claimant's login identification and password. It is possible that an external hard drive could be connected to another computer. However, the evidence indicated that the "p" drive was actually an internal drive as clearly was the "c" drive.

Concerning the operation of a business, the claimant began his own business by creating a website for golf instruction. In 1997 he reviewed this business with J.B. Besong of the employer, who informed the claimant that this business was not a conflict of interest with what the employer was doing. Thereafter the claimant failed to mention this business to anyone at the employer, including mentioning it at or on the computer during ethics classes or reviews. The claimant never received direct permission to use the employer's computer for the claimant's personal business. Nevertheless, for a period of time, the claimant did use the employer's computer for personal business when he would take it home after work. The employer does permit employees to take their computer's home and allows some personal use

of the computers if it does not interfere with the employer's business and complies with the computer use policy noted above.

Concerning the alleged illegal activities of sharing multiple music files, the claimant was accused of this because a folder on another server had 16.7 gigabytes of music files, which the employer alleged that the claimant had placed there and shared with employees. This is a violation of rules of the recording industry. The claimant had "ownership" of the folder because it had his login identification and password.

The claimant filed for unemployment insurance benefits effective October 9, 2005, but has received unemployment insurance benefits only in the amount of $674.00 for benefit weeks ending November 19 and 26, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.

2. Whether the claimant is overpaid unemployment insurance benefits. The claimant is overpaid unemployment insurance benefits in the amount of $674.00.

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).

Although the parties agree on little else, the parties do agree that the claimant was discharged on October 13, 2005, and the administrative law judge so concludes. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Although it is a very close question, the administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witnesses provided three reasons for the claimant's discharge: viewing and keeping pornographic files on the employer's computer assigned to the claimant; conducting personal business using the employer's laptop computer; and illegally sharing multiple music tiles.

Concerning the viewing and keeping of pornographic files and images on the employer's computer, the administrative law judge concludes that the claimant did in fact load or store or keep and view pornographic files and images on the employer's computer in violation of the employer's computer use policy. The employer has a computer use policy, RC-EB-POL002 prohibiting derogatory, offensive, or pornographic materials being used on the employer's computer or anything that would embarrass the employer. Further, there is a notice that comes on the computer screen anytime a computer is turned on informing the user that the computer should be used for business purposes. The claimant testified that he was aware of the policy and the computer screen. The claimant denied ever downloading or keeping or viewing any pornographic images or files. However, the evidence establishes that the claimant's computer, both a "p" drive and a "c" drive, contained pornographic images and files, including images showing individuals explicitly engaged in sexual acts and other individuals in complete nudity. The claimant does not deny this but merely confesses ignorance as to how those images or files got into his computer. The evidence establishes that the images and files were placed in the claimant's computer using his login identification and password. Even the claimant conceded that he never gave his login identification or password to anyone else nor did he have any evidence that someone else had obtained his login identification or password. The claimant testified that an external drive could be plugged into another computer and therefore another computer could download those files and images into the claimant's computer without the claimant's knowledge. However, the evidence establishes that the "c" drive containing some pornographic images and files was an internal drive, which could not be so manipulated. The evidence also indicates that the "p" drive was also an internal drive although the evidence is not as clear on this point. The only other way the images could have gotten into the claimant's computer was through some kind of network use if the person was aware of the claimant's identification and password. The administrative law judge concludes that this is most unlikely. Accordingly, the administrative law judge is constrained to conclude, although it is a very close question, that there is a preponderance of the evidence that the claimant downloaded or placed or stored and viewed pornographic files and images on the employer's computer in violation of the employer's policy. The administrative law judge is further constrained to conclude that these acts in doing so were deliberate acts constituting a material breach of his duties and obligations arising out of his workers contract of employment and evince a willful and wanton disregard of the employer's interest and are disqualifying misconduct.

Concerning the conduct of business using the employer's laptop computer, the evidence establishes that the claimant did in fact use the employer's laptop computer to conduct his own personal business maintaining a web site for golf instructions. The claimant conceded that he did so. The claimant testified that when he first began the business he spoke to J.B. Besong, who told the claimant that there was no conflict of interest between the claimant's business and that of the employer. However, the claimant did not get authority or permission from the employer at that time, or any other time, to use the employer's computer in the claimant's business. The claimant also never informed the employer of any such use of the employer's computer. The claimant testified that when he obtained the conflict of interest statement from the employer that he did not have the computer which he now concedes he used to help him in his business. It is true that the employer permits employees to take the employer's computers home and even permits some personal use if it complies with the employer's computer use policies and does not interfere with the employer's business. Whether the claimant's use of the employer's computer for his own personal business is disqualifying misconduct is also a very close question. On the evidence here, the administrative law judge is constrained to conclude that such use is prohibited by the employer and is disqualifying misconduct. The employer has computer use policies as set out in the findings of fact. The claimant seeks to defend his actions by stating that he obtained an opinion that his business was not a conflict of interest. This may well be, but it does not answer the question as to whether the claimant is free to use the employer's computer to conduct his own personal business. The administrative law judge concludes that the employer does not permit such use of its computers and the claimant's such use was disqualifying misconduct. The evidence does indicate that employees can, on a limited basis, use their computers for personal use, but this again does not specify personal business use. The claimant was using the employer's business to conduct his own personal business. Accordingly, the administrative law judge concludes that the claimant's use of the employer's computer to conduct his personal business were deliberate acts constituting material breach of his duties and obligations arising out of his workers contract of employment and evince a willful and wanton disregard of an employer's interests and are also disqualifying misconduct. The administrative law judge concludes that what occurred here was more than ordinary negligence in an isolated instance or a good faith error in judgment or discretion, which would not be disqualifying misconduct. What finally convinces the administrative law judge that the claimant's actions were willful and deliberate, and not a good faith error in judgment or discretion or ordinary negligence, is the claimant's admission that in various ethics training classes on the computer the claimant never indicated or announced, either for online classes or in any other classes or in any other way, that he was using the employer's computer for personal business. The administrative law judge specifically notes that for over 20 years the claimant was in the employer's computer area and was a senior employee for at least the last 9 months. The claimant should have been fully aware of all of the employer's policies related to computer use and should have conducted himself with the utmost care and responsibility in view of his long employment in the computer area for the employer and his senior position. The claimant did not and his failure to do so was disqualifying misconduct.

Concerning the alleged illegal sharing of multiple music files, the administrative law judge is constrained to conclude, although again it is a close question, that the employer has not demonstrated by a preponderance of the evidence that the claimant actually shared music illegally or improperly with others. The evidence establishes here that the music was stored on another server in a folder containing music files. The employer's witnesses testified again that it identified the claimant through the claimant's login identification and password, but the administrative law judge is not convinced here that others could not have placed the music in the folder. The administrative law judge specifically notes that the evidence indicates that the music was on another server and was not necessarily indigenous to or contained solely in the

employer's computer assigned to the claimant. Accordingly, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant violated any music rules by sharing multiple music files and, as a consequence, this allegation is not disqualifying misconduct.

In summary, and for all the reasons set out above, although it is a close question, the administrative law judge concludes that the claimant did download, store, keep and view pornographic files on the employer's computer and did conduct personal business using the employer's computer, both in violation of the employer's policies and both disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $674.00 since separating from the employer herein on or about October 13, 2005 and filing for such benefits effective October 9, 2005. The administrative law judge further concludes that the claimant is not entitled to such unemployment insurance benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of October 27, 2005, reference 01, is reversed. The claimant, William F. Barthel, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. The claimant has been overpaid unemployment insurance benefits in the amount of $674.00.

dj/kjw