

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRIAN J DEATON
Claimant

APPEAL NO. 09A-UI-15893-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

RICH METALS CO
Employer

**Original Claim: 07/26/09
Claimant: Respondent (1)**

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The employer appealed a representative's October 12, 2009 decision (reference 01) that held the claimant qualified to receive benefits, and determined the employer's account was subject to charge because the claimant had been discharged for nondisqualifying reasons. A telephone hearing was held on November 30, 2009. The claimant participated in the hearing. Annette Snyder, a human resource consultant, Donna Porter, the vice president, and Denise Newman, an administrative assistant, appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on January 12, 2009. The claimant worked full-time as a cashier. Rick Porter, the owner, supervised the claimant.

During the week of July 20, Snyder, the employer's independent human resource consultant, reviewed Internet usage logs for several companies she worked for. She noticed some of the sites the report indicated the claimant had accessed were pornographic sites. The Internet activity report also indicated the claimant frequently accessed other non-work-related sites such as Facebook and Hotmail. She reported her discovery to Porter. The employer decided to monitor the claimant's Internet usage, but did not say anything to the claimant.

The following week, the claimant used the Internet frequently to access non-business-related sites. His Internet usage log also indicated he continued to access adult or pornographic sites. The employer did not say anything to the claimant about his Internet usage until he was discharged on July 29, 2009. The employer does not have an Internet policy.

On July 29, Snyder told the claimant he was discharged for excessive Internet usage - accessing non-business-related sites and pornographic sites during work hours. The employer also discharged the claimant for alleged theft.

On July 20, Donna Porter noticed the claimant fold up some money and put it in his pocket. Donna Porter concluded the claimant took pop money that had been brought into the office to count. The money was on the table where the claimant was at. Although this money had been counted before it was brought into the office, the employer did not count the money after Porter saw the claimant put money in his pocket. She did not say anything to anyone until later that night, when she told her husband, Rich Porter, about her observation. The employer did not talk to the claimant about Donna Porter's observations.

On July 24, Newman heard the cash register drawer open and then noticed the claimant had a \$100.00 dollar bill in his hand when he asked her if some papers on the floor were hers. Newman did not say anything to the claimant about the money she saw in his hand. Instead, she went to the controller and reported the money in the claimant's hand. The employer counted the drawer and discovered it was about \$300.00 short. The employer did not say anything to the claimant about Newman's report or the cash register drawer shortage. The claimant denied he took any of the employer's money. The claimant continued to handle cash after the July 20 and 24 reported incidents. The claimant had access to thousands of dollars in the cash register.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good-faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The employer established business reasons for discharging the claimant. Since the employer did not have an Internet usage policy, the fact the claimant's Internet usage shows he used the Internet over 70 percent does not establish that he intentionally or substantially disregarded the employer's interests. Without giving the claimant any warning that the employer did not allow employees to use the Internet for non-business-related purposes, the claimant had no idea the employer did not allow him use the Internet for non-work-related purposes or how much time the employer considered excessive.

The fact the claimant's Internet usage indicated he accessed adult sites at work raised red flags for Snyder. But, the claimant's testimony that the owner knew he looked at these sites or went to the sites upon the owner's suggestion is not disputed, because the owner did not testify at the hearing. If the owner initially suggested the claimant access a certain adult web site, the claimant did not commit work-connected misconduct when the employer did not warn him he could not do this again.

The assertion the claimant took money from the employer is suspect. On July 20, the employer knew the pop money had been counted before it was brought into the office. Since Donna Porter asserted the claimant took pop money, it is illogical for her not to say anything when she saw him do this or at least count the pop money again to see how much, if any pop, money was missing. Noticing the claimant folded some money and put it in his pocket does not establish that he took any of the employer's money.

The claimant and Newman were friends at work. It does not make sense for Newman not to say anything to him, a friend, if she thought he took money from the cash register. It is also illogical for the employer not to have said anything to the claimant on July 24 when the employer found the drawer was about \$300.00 short. The fact Newman was afraid of losing her job after she received a written warning may indicate a credibility issue with her testimony.

Although Porter and Newman testified the claimant took the employer's money on July 20 and 24, the claimant denied he took any of the employer's money. Since the employer continued to allow the claimant to handle cash transactions and gave him access to thousands of dollars until he was discharged puts into question the accuracy of the employer's testimony. The facts do not establish that the claimant stole any of the employer's money.

Based on a preponderance of the credible evidence, the employer did not establish that the claimant committed work-connected misconduct. Therefore, as of July 26, 2009, the claimant is qualified to receive benefits.

DECISION:

The representative's October 12, 2009, decision (reference 01) is affirmed. The employer discharged the claimant for business reasons. The evidence does not establish that the claimant committed work-connected misconduct. As of July 26, 2009, the claimant is qualified to receive benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/kjw