

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARK R MCCORMICK
Claimant

APPEAL NO. 10A-UI-15022-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

JENNIE EDMUNCSON
MEMORIAL HOSPITAL
Employer

OC: 09/19/10
Claimant: Appellant (2-R)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated October 22, 2010, reference 01, which held the claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on January 3, 2011. The claimant participated. The employer participated by Anthony Chisem, team leader food services, and Kathy Heuwinkel, staff assistant. The record consists of the testimony of Anthony Chisem; the testimony of Kathy Heuwinkel; and the testimony of Mark McCormick.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a hospital located in Council Bluffs, Iowa. The claimant was hired on June 30, 2006. He was a nutrition service technician. The claimant was known as a casual employee. He worked when needed for the employer. The claimant was also a college student. The claimant's last day of work was scheduled for September 19, 2010. He was terminated on September 21, 2010.

One of the job duties of a nutrition service technician was to work in the call center. Patients in the hospital would call in their food orders. The claimant worked on a computer that had access to the internet. The employer had a written policy that prohibited use of its computers for personal reasons. The claimant was given a copy of the handbook. On August 14, 2010, which was a Saturday, the claimant was working in the call center. He decided to use the internet to research options for his college education. His supervisor, Anthony Chisem, came into the call center and saw what the claimant was doing. He watched the claimant for approximately five minutes. He then told the claimant that he was not supposed to use the internet at all for personal reasons. The claimant was not terminated at that time.

On or about September 18, 2010, employees who were using the computers in the call center encountered a problem. When they attempted to open up a program that gave them information on patient meal requests, the program would not open. An unknown file appeared and it could not be opened. The unknown file was discovered to be several files belonging to the claimant. The first of these files contained a lot of religious information. The files were able to be deleted, but the employer assumed that the claimant had been using the computer for personal reasons after the warning on August 14, 2010.

The claimant was scheduled to work on September 19, 2010. The supervisor present had been informed by Mr. Chisem that the claimant was not to be allowed to work and that the claimant must speak to Mr. Chisem. The claimant assumed he was terminated, since his name was scratched off the schedule. The claimant was informed on September 21, 2010, that he had been terminated.

REASONING AND CONCLUSIONS OF LAW:

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. The employer has the burden of proof to show misconduct.

The evidence established that the claimant violated the employer's policy against use of its computers for personal reasons. The claimant pled ignorance of the policy. His first warning came on August 14, 2010. The claimant assured the employer he would not violate the policy again and he testified that he did not use the computer for personal reasons after his warning.

On or about September 18, 2010, computer files that clearly belonged to the claimant blocked access to reports that employees needed to do their jobs. The question is when those files were created. The claimant testified that he did not use the employer's computer for personal reasons after August 14, 2010, and that the files that mysteriously popped up were temporary files he had downloaded on August 14, 2010. The employer was asked what those files were and when they were created. Neither Mr. Chisem nor Ms. Heuwinkel knew the answer to the question. Mr. Chisem never saw the files and could only say that one of them contained religious items. The claimant said that one of the things he researched was a religion major and that the religious items were part of the download that took place on August 14, 2010.

The administrative law judge concludes that there is insufficient evidence in this record to establish misconduct. The crucial missing information is when those personal files were created. If the claimant did indeed download them on August 14, 2010, then there is no current act of misconduct. If the files were created after August 14, 2010, then the evidence could show that the claimant deliberately violated a known policy of the employer, for which he had been previously warned. Neither of the employer's witnesses saw the personal files and neither could testify when those files were created. Absent this type of evidence in the record, the administrative law judge cannot find there was a current act of misconduct. Benefits are allowed if the claimant is otherwise eligible.

The claimant testified at the hearing that he is a college student. This testimony leads to the issue of whether the claimant is able and available for work. This issue is remanded to the claims section for determination.

DECISION:

The representative's decision dated October 22, 2010, reference 01, is reversed. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible. This case is remanded for determination on whether the claimant is able and available for work.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw