

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRYAN F VESTAL

Claimant

APPEAL NO. 07A-UI-01998-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC

Employer

**OC: 01/21/07 R: 03
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Tyson Fresh Meats, Inc. (employer) appealed a representative's February 14, 2007 decision (reference 01) that concluded Bryan F. Vestal (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 13, 2007. The claimant participated in the hearing. Jerome Rinken 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:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on August 30, 2005. He worked full time as a maintenance worker in the employer's Waterloo, Iowa, pork processing facility. His last day of work was January 22, 2007. The employer discharged him on that date. The reason asserted for the discharge was sending a lewd email from his personal email account to another employee on that employee's Tyson email account.

On January 7, while off duty, the claimant had sent an initial email from his personal account to a female Tyson employee inquiring as to whether the woman would be open to getting to know him socially. Early on November 15 the woman declined, indicating that she avoided social relationships with other Tyson employees. Shortly before noon, the claimant, again off duty, responded to her on his personal account acknowledging her response.

Shortly after 1:00 p.m., another email was sent from the claimant's personal email account to the woman's Tyson email account which was of a very lewd nature. The claimant had not sent or authorized the email. He became aware that someone else had accessed his personal email account on the evening of January 15 when his father called him to inform him that the claimant's stepmother, who was also on the claimant's email address book, had received a lewd email "from" the claimant, which turned out to be very similar to the email sent to the woman at

Tyson. The claimant acknowledged that there had been at least one occasion in which he had shared his personal email information and password with another person.

On the morning of January 16 the claimant sent out an email to everyone in his address book alerting them that someone had accessed his email account and sent an offensive email to some people, for which he apologized. The female Tyson employee responded by ordering the claimant to remove her from his address book and not to contact her again. She subsequently reported the matter to the employer. The claimant then learned that two other women in his address book had also received substantially similar lewd emails "from" him.

The employer discharged the claimant because it determined that it was at least possible that the claimant had himself sent the lewd email to the Tyson employee.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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.

The focus of the definition of misconduct is on acts or omissions by a claimant that “rise to the level of being deliberate, intentional or culpable.” Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer’s interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer’s interest, or
 2. The employee’s duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is the believe that he had or could have sent the lewd email to the other employee. However, in order to establish the discharge was for disqualifying misconduct, it is the employer’s burden to establish by at least a preponderance of the evidence that the claimant was in fact responsible for the action attributed to him. Cosper, supra. The employer has not satisfied this burden. It is at least conceivable that someone other than the claimant had accessed his personal email account, and particularly given the fact that three other people in his email address book, including his own stepmother, had been sent a similar email, it appears more probable that not that it was not the claimant who had sent the lewd email. While it is understandable why the employer might not wish to risk even the possibility that it might have been the claimant and therefore made the business decision to discharge him, based upon the evidence provided, the claimant’s actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative’s February 14, 2007 decision (reference 01) is affirmed. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw