BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

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TERESA K STERK	:	
	:	**HEARING NUMBER:** 20BUI-03164
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
VERMEER MFG CO	:	
	:	
Employer	:	

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A, 96.3-7

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claimant appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Teresa Sterk (Claimant) worked for Vermeer Manufacturing Company (Employer) as a full-time engineering coordinator from March 29, 2004 until she was fired on March 2, 2020.

On the morning of Friday, February 28, 2020, the Employer learned the Claimant was indicted, along with her mother, sister, Ankur Khemani, Gaurav Bhasin and others, in the United States District Court for the Eastern District of Tennessee at Knoxville. The employer received a copy of the indictment. The Employer examined its computer records and found messages between the Claimant and Ankur Khemani on the Claimant’s work computer from December 7, 2013, and December 26, 2018.

On Monday, March 2, 2020, the Employer telephoned the Claimant and terminated her. The Employer sent the Claimant a termination letter that said:

> It was recently brought to our attention that you have been charged with federal crimes relating to fraud and money laundering. That conduct, which has been charged by a federal grand jury, does not align with our characteristics and behaviors and is contrary to our Code of Conduct. Therefore, your employment with Vermeer is being terminated, effective immediately, March 2, 2020.

(Exhibit One). The remainder of the termination letter addresses winding up the employment relationship, and does not refer to or describe the reasons for discharge. We find that the noun "conduct" as modified by the adjective "that" as a demonstrative determiner in the second quoted sentence is a reference to alleged fraud and money laundering mentioned in the first quoted sentence. Also, the clause "which has been charged by a federal grand jury" has as its antecedent the previously occurring word "conduct."

The Employer has failed to prove by the greater weight of the evidence that the Claimant in fact used the Employer's resources or equipment in a criminal act. The Employer has failed to prove any other act by the Claimant which act was actually considered by the Employer in making its termination decision, and which act constituted misconduct.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
>
> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

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 substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

It is the duty of the Board as the ultimate trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The Board, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, as well as the weight to give other evidence, a Board member should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what evidence to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence the Board believes; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). The Board also gives weight to the opinion of the Administrative Law Judge concerning credibility and weight of evidence, particularly where the hearing is in-person, although the Board is not bound by that opinion. Iowa Code §17A.10(3); *Iowa State Fairgrounds Security v. Iowa Civil Rights Commission*, 322 N.W.2d 293, 294 (Iowa 1982). We note that the Members of this Board each listens to the digital recording of this hearing and each has equal access to factors such as tone of voice, hesitancy in responding, etc. as the Administrative Law Judge. The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence considering the applicable factors listed above, and the Board's collective common sense and experience. We find by the greater weight of the evidence that the Claimant was terminated because she was charged with a crime in Tennessee and because the Employer believed that committing such a crime was a violation of its Code of Conduct. We do not find credible that at the time the discharge decision was made the fact that the Claimant had used the Employer's email system to conduct a personal side business was a motivating factor in the discharge decision. The Employer has not shown it would have fired the Claimant had it believed the side business in question to be legal. We find that the Employer would have fired the Claimant for being charged with this crime(s) regardless of her use of its email system.

The question now becomes whether the greater weight of the evidence establishes that the Claimant engaged in misconduct that caused her to be charged with a crime. The evidence of the crime includes the indictment itself, and the fact of certain emails consistent with the allegations in the indictment. This is just not enough to show that the Claimant actually violated the law. Thus, the Employer has not shown by a preponderance that the Claimant in fact engaged in the illegal conduct alleged in the indictment. And, in any event, the Employer based its decision on the fact of the charges themselves. Since being charged with this crime was the necessary and precipitating cause of the discharge decision the Employer has failed to prove that the Claimant was fired for misconduct.

To be clear, we do **not** base our decision on whether the alleged misconduct was a current act. Similarly, the outcome in other cases plays no role whatsoever in our decision in this case. We have also given no consideration to the provisions of Iowa Code §96.11(9). Also, the only role of the Employer's tolerance of others' personal use of email in our decision is that this fact tends to undermine the claim that the termination was based on such a use by the Claimant. We would have found against the Employer on this claimed motivation based on the contents of the discharged letter in any event. Naturally, since we do not find that personal use of company email has been proven to be a factor in the discharge decision, evidence of that the Claimant had sent emails to her lawyers using the Employer's account would not change the outcome.

The requirement of a causal connection between the alleged disqualifying misconduct and the termination of employment has been repeatedly made clear by the Iowa Supreme Court. For example, in *West v. Employment Appeal Board*, 489 N.W.2d 731(Iowa 1992) the employer asserted that the claimant was disqualified because she failed to answer questions that had been put to her. The Iowa Supreme Court stated that "an employer must establish that the employer discharged the claimant because of *a specific act or acts of misconduct*." *West* at 734 (emphasis in original). The requirement of causality was so essential that the Court refused to even address whether or not the claimant had committed misconduct by refusing to answer the questions. The Court found that "[b]ecause the school district failed to prove a direct causal connection between the discharge and West's refusal to answer the questions, we do not reach the issue whether such refusal constitutes misconduct." *Id.* Likewise in *Larson v. Employment Appeal Bd*., 474 N.W.2d 570 (Iowa 1991) the Supreme Court refused to disqualify the claimant based on deceit since the termination was not based on that deceit. In explaining its decision to allow benefits the Court wrote "a careful reading of this record reveals that Larson was fired for her incompetence, not for her deceit. Any claim that she was fired for deceit in applying for employment was a later idea, supplied after the fact of her termination." *Larson* at 572. In a nutshell "[t]hough she might have been, Larson was not fired for her deceit", *Id.,* and therefore the existence of deceit could not disqualify the claimant. Finally, in *Lee v. Employment Appeal Board*, 616 N.W.2d 661(Iowa 2000) the Board had disqualified the claimant because the claimant refused to consider a suspension and drug testing as discipline from the employer. The Court found this could not be misconduct:

> [T]he agency should not have relied on this evidence because Lee was not discharged because he refused to accept a two-week suspension and undergo drug testing four times a year. . . .Lee's refusal occurred after the last incident that gave rise to the employer's decision to discharge him. Therefore, Lee's refusal had nothing to do with the reason the county discharged him. The employer cannot now rely on such refusal as additional proof of misconduct.

Lee at 669. Applying this precedent, it is not enough that the Claimant could have been fired for using company email to conduct personal side business. The greater weight of the evidence fails to establish that the Claimant was fired for this reason. And "could have" reasons are not enough to disqualify a claimant if they did not actually result in the termination. *Larson* at 572. This means the Employer has not proven the Claimant engaged in the act alleged to constitute the final act of misconduct. Since it was this act which was a necessary and precipitating cause of the discharge the Employer has not proven that the Claimant was discharged for misconduct. The bottom line in this case is that being *charged* with a crime is not an act of misconduct, and this is the reason the Employer fired the Claimant.

DECISION:

The administrative law judge's decision dated May 21, 2020 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no proven disqualifying reason. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible. The overpayments entered against claimant in the amount of $7,600.00 is vacated and set aside. Of this $3,600 is chargeable to the federal FPUC benefit.

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James M. Strohman

_____
Myron R. Linn

RRA/fnv