

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MARK J SEVCIK
Claimant

THE UNIVERSITY OF IOWA
Employer

APPEAL 24A-UI-04634-SN-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/21/24
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Mark J. Sevcik, filed an appeal from the May 10, 2024, (reference 01) unemployment insurance decision that denied benefits March 11, 2024, based upon the conclusion he was discharged but misconduct was not found. The parties were properly notified of the hearing. A telephone hearing was held on May 31, 2024, at 10:00 a.m. The claimant participated and testified. His attorney, Paul Gamez, was not present. The employer, The University of Iowa, participated through Human Resources Associate Scott Coons and Senior Associate Athletics Director of Human Resources Suzanne J. Hilleman. Ms. Coons served as representative.

Exhibit 1 was received as evidence. The employer's other proposed exhibit was not admitted because it was not sent to the claimant prior to the hearing date as required by Iowa Admin. Code r. 871-26.15.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant worked full time as an IT support consultant from September 12, 2011, until he was separated from employment on March 11, 2024, when he was terminated.

The employer has an employee manual. The employee manual contains two policies relevant to this case, the Ethics and Responsibilities Policy, and the Acceptable Use of Technology Policy. The first policy asks employees to manage data and other information taken from the public with honesty and integrity with special attention to privacy rights. The second forbids employees from sharing login and password information or otherwise providing access to third parties who are unauthorized to do so. Finally, the employer has a ticket policy regarding complimentary tickets

issued to staff. This policy allows employees to transfer these tickets to family members, but expressly forbids sale to third party websites. The consequence of doing so relates to loss of ticket privileges. No employment-related consequence is stated in the policy.

In mid-February 2024, the claimant spoke with his adult son about transferring women's basketball tickets to him for the University of Iowa's historic season led by one of its most iconic athletes. The claimant believed his son would use these tickets only to attend in person. The claimant logged into the ticket application on his son's phone and handed him back the phone.

On March 1, 2024, Ms. Hilleman received information from the ticket office suggesting that the claimant had transferred his tickets for sale on the open market on a third-party selling website. Upon further investigation, Ms. Hilleman determined tickets assigned to the claimant's application had been sold to the Michigan game on February 15, 2024, the Illinois game on February 17, 2024, and the Ohio State game on February 18, 2024.

On March 4, 2024, Ms. Hilleman informed the claimant of this information and asked him to attend an investigatory interview on March 6, 2024. In response, the claimant replied that he did not know this had been occurring because the emails informing him of sales were going to his spam folder.

On March 6, 2024, Ms. Hilleman conducted her interview as scheduled. The claimant denied any knowledge of the sales had been occurring and explained that he merely logged in on his son's phone to give him access to the ticket application.

On March 11, 2024, Ms. Hilleman reasoned the claimant violated the policies listed above by providing his login and password to his son and allowing for the transfer of tickets by his son to a third-party seller website. The employer provided a copy of the termination notice. (Exhibit 1)

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes the claimant was discharged from employment on March 11, 2024, due to non-disqualifying circumstances. Benefits are granted, provided the claimant is otherwise eligible.

The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as the 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 administrative law judge 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, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's version of events to be more credible than the employer's recollection of those events.

Specifically, I find the claimant credible that he logged in on his son's phone. Ms. Hilleman and Mr. Coons did not deny the application could retain the login information.

I also find it credible that the claimant's spam folder concealed his son's transfer of the tickets. This was a short period of time for checking a work-related spam folder. The claimant is also the only person who has seen his email, despite the employer having the ability to access them.

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.

Iowa Admin. Code r. 871-24.32(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.

Iowa Code section 96.5(2)b, c and d provide:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

b. Provided further, if gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers.

c. Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act. Determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith.

d. For the purposes of this subsection, "*misconduct*" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

- (1) Material falsification of the individual's employment application.
- (2) Knowing violation of a reasonable and uniformly enforced rule of an employer.
- (3) Intentional damage of an employer's property.
- (4) Consumption of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in a manner not directed by the manufacturer, or a combination of such substances, on the employer's premises in violation of the employer's employment policies.
- (5) Reporting to work under the influence of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in an off-label manner, or a combination of such substances, on the employer's premises in violation of the employer's employment policies, unless the individual is compelled to work by the employer outside of scheduled or on-call working hours.
- (6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.
- (7) Incarceration for an act for which one could reasonably expect to be incarcerated that result in missing work.
- (8) Incarceration as a result of a misdemeanor or felony conviction by a court of competent jurisdiction.
- (9) Excessive unexcused tardiness or absenteeism.

(10) Falsification of any work-related report, task, or job that could expose the employer or coworkers to legal liability or sanction for violation of health or safety laws.

(11) Failure to maintain any licenses, registration, or certification that is reasonably required by the employer or by law, or that is a functional requirement to perform the individual's regular job duties, unless the failure is not within the control of the individual.

(12) Conduct that is libelous or slanderous toward an employer or an employee of the employer if such conduct is not protected under state or federal law.

(13) Theft of an employer or coworker's funds or property.

(14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

The final incident is straightforward in this case because the employer discovered all the sales on March 1, 2024. Nevertheless, the employer essentially has two different theories for why the claimant's actions or inaction violated a known company rule:

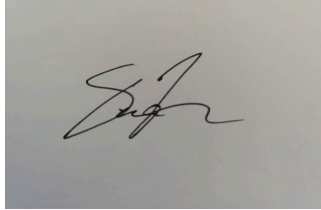
First, the employer contends that the transfer of the tickets to a third-party seller website constitutes disqualifying misconduct under Iowa Code section 96.5(2)d(2). I find this cannot be the case for a variety of reasons. Most importantly, the employer's policy states only the loss of privileges to ticket access as a potential punishment. Absent this consequence being spelled out in policy, the claimant was not adequately put on notice for this to be disqualifying. Furthermore, I find the claimant was unaware of the transfer until it was too late and he was facing termination. He was not disciplined prior to termination such that he would realize the application to his employment.

Second, the employer contends the claimant's sharing of his login information and password to someone else violates policies regarding access to information. These policies give more notice in terms of at least implying an employment-related consequence, but I do not find the claimant's decision to login on his son's phone to violate the spirit of these rules. No access was given to his son, other than to the application. Ms. Hilleman conceded on the record that access to the ticket platform alone would not violate the spirit of these policies. That is because the tickets were not deemed confidential or a breach of privacy.

Under either theory, the employer cannot show the claimant engaged in disqualifying misconduct. Benefits are granted, provided he is otherwise eligible for benefits.

DECISION:

The May 10, 2024, (reference 01) unemployment insurance decision is REVERSED. The claimant was discharged from employment on March 1, 2024, due to non-disqualifying circumstances. Benefits are granted, provided he is otherwise eligible for benefits.

A rectangular box containing a handwritten signature in black ink. The signature is cursive and appears to read "Sean M. Nelson".

Sean M. Nelson
Administrative Law Judge II

June 4, 2024
Decision Dated and Mailed

SMN/jkb

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: eab.iowa.gov**

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.

AN APPEAL TO THE BOARD SHALL 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.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or 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.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.