IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ERIN K ANDON
Claimant

PER MAR SECURITY & RESEARCH CORPORATION
PER MAR SECURITY SERVICES
Employer

APPEAL NO: 08A-UI-03301-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/02/08 R: 04
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Per Mar Security & Research Corporation (employer) appealed a representative's March 25, 2008 decision (reference 01) that concluded Erin Andon (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for April 21, 2008. The claimant participated personally. The employer participated by Mindy Zumdome, Director of Human Resources, and Tim Smith, Director of Customer Relations and Purchasing. The employer offered and Exhibits One and Two were received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on August 13, 2001, as a full-time customer care representative. The claimant received a copy of the employer's policies.

On October 12, 2005, the employer sent an e-mail memo to employees regarding not making personal calls during work time. The employer issued the claimant a verbal warning on March 28, 2006, stating Internet instant messaging was not allowed. On April 18, 2006, the employer issued the claimant a verbal warning for playing on Internet. The employer issued the claimant a written warning on May 23, 2007, regarding professionalism.

It was common in the workplace for employees to have personal conversations through company e-mail. Jokes, forwards, chain mails and items of a sexual or suggestive nature were exchanged at work. Employees often visit non-work web sites even though the company policies prohibited this behavior. The employer only addresses the problem if it was brought to its attention.

In mid-February 2008, the claimant was having a conversation with a co-worker via e-mail. The conversation turned from business to a personal, sexually flirtatious exchange. The co-worker told the claimant that a picture could speak a thousand words. The claimant responded by asking him to imagine how many words a video could speak. The co-worker said he would like to see that video. The claimant asked for the co-worker's home e-mail address so she could send the video to him. The co-worker asked for the video and sent the claimant his home e-mail address. Later, away from work the claimant sent a video of a sexual nature of herself to the co-worker's home e-mail address. The co-worker complained to the employer on or about February 27, 2008, and the employer terminated the claimant.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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 employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). The employer did not show sufficient evidence of

job-related misconduct. The conduct for which the claimant was terminated occurred outside of work. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's March 25, 2008 decision (reference 01) is affirmed. The employer has not met its proof to establish job related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/pjs