IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

SARA A BLONG
3218 – 75TH ST
NORWAY IA 52318

TOYOTA MOTOR CREDIT CORP
C/O TALX UCM SERVICES INC
PO BOX 283
ST LOUIS MO 63166

Appeal Number: 05A-UI-12063-JTT
OC: 10/02/05 R: 03
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

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.

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.

YOU MAY REPRESENT yourself in this appeal or you may 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. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Toyota Motor Credit filed a timely appeal from the November 16, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 14, 2005. Claimant Sara Blong participated. Human Resources Generalist Jodi Driscoll represented the employer. Exhibits One through Six were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Sara Blong was employed by Toyota Motor Credit as a full-time inventory control clerk from June 23, 2003 until September 28, 2005, when Human Resources Manager Vicki Doyle and Inventory Control Manager Kevin Boland discharged her for misuse of the employer's e-mail system.

On September 9, 2005, the employer reviewed Ms. Blong's e-mail correspondence from a two-month period and concluded that Ms. Blong had used the employer's computer network to send personal e-mail messages in violation of the employer's written electronic communications policy. The policy limits employees to "occasional personal use" of the employer's network, prohibits transmission of large graphics files, and prohibits offensive material such as jokes that contain ethnic slurs. The employer observed that Ms. Blong had transmitted a Norwegian "Ole" joke containing profanity. The employer observed that Ms. Blong had forwarded a video clip entitled "Beer Boy." The employer observed that some of the e-mail messages were sent at a time when Ms. Blong was neither on break or at lunch, which would violate the employer's written professional conduct policy. Ms. Blong used the e-mail system to coordinate an Avon order with another employee and solicited her coworkers to vote for her nephew in an online photo contest. The employer asserts that both activities violated the employer's non-solicitation policy. Finally, the employer concluded that Ms. Blong's personal use of the e-mail system violated the employer's written harassment policy in that Ms. Blong and another employee exchanged comments, criticisms and jokes about coworkers.

On September 19, the employer suspended Ms. Blong while it continued its investigation of her use of the computer network. Human Resources Generalist Jodi Driscoll testified that it is the employer's standard practice to advise an employee suspended pending an investigation that the investigation could result in discipline up to and including discharge. However, Ms. Driscoll was not present for the meeting at which the employer suspended Ms. Blong. In addition, Ms. Driscoll lacked information regarding whether Mr. Boland had, in fact, informed Ms. Blong at the time of the suspension that her e-mail messages placed her at risk of discharge. On September 28, Inventory Control Manager Kevin Boland summoned Ms. Blong to a meeting at which he and Human Resources Manager Vicki Doyle advised Ms. Blong that she was being discharged for violating the above-referenced policies. Ms. Blong had received no prior reprimands in the course of her employment. Ms. Blong was aware that other employees had received reprimands for misuse of the computer network.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Blong was discharged for misconduct in connection with the employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Since the claimant was discharged, the employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act to misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The evidence in the record establishes that Ms. Blong did send or forward multiple e-mail messages that violated the employer's electronic communications policy. Ms. Blong was aware at the time she sent several of the messages that the content violated the employer's electronic communications policy. In addition, Ms. Blong sent several e-mail messages at a time when she was not on break or at lunch and was aware that her actions violated the employer's written professional conduct policy. The e-mail messages the employer provided for the hearing are not sufficient to establish that Ms. Blong violated the employer's harassment policy. The evidence in the record is insufficient to prove that Ms. Blong violated the employer's non-solicitation policy. Though Ms. Blong exercised poor judgment in responding to, sending, or forwarding e-mail that violated the employer's electronic communications policy, she had not

received any prior reprimands for that conduct or any other conduct. The administrative law judge concludes that Ms. Blong's poor judgment in violating the employer's e-mail policies does not constitute the *substantial* misconduct that would disqualify her for benefits. See Iowa Code Section 96.5(2)(a).

In addition, the employer has failed to prove that Ms. Blong was discharged for a "current act" of misconduct. See 871 IAC 24.32(8). The evidence indicates that employer was aware no later than September 9 that Ms. Blong had participated in e-mail correspondence that violated the employer's electronic communications policy. However, the employer did not suspend Ms. Blong until September 19. Thus, there was a ten-day delay between the date upon which the conduct came to the attention of the employer and the date upon which Ms. Blong was suspended. The evidence in the record is insufficient to prove that Mr. Boland notified Ms. Blong on September 19 that she faced possible discharge once the employer completed its investigation. Thus, the evidence establishes a 19-day delay between the date upon which the conduct came to the attention of the employer and the date upon which Ms. Blong was discharged for the conduct. Thus, at the time of the suspension and at the time of discharge, there was no current act of misconduct. Accordingly, Ms. Blong would not be disqualified for benefits even if the evidence had established substantial misconduct.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Blong was discharged for no disqualifying reason. Accordingly, Ms. Blong is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Blong.

DECISION:

The Agency representative's decision dated November 16, 2005, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

jt/kjw