

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KELLY B MANWARREN
Claimant

APPEAL NO. 17A-UI-04221-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

METAL WORKS INC
Employer

OC: 03/26/17
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Kelly Manwarren filed a timely appeal from the April 13, 2017, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Mr. Manwarren was discharged on March 29, 2017 for violation of a known company rule. After due notice was issued, a hearing was held on May 9, 2017. Mr. Manwarren participated. Katie Techen represented the employer and presented additional testimony through Phil Ramstack. Exhibits 1 through 9 and A were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kelly Manwarren was employed by Metal Works, Inc., as a full-time, salaried inventory control and management employee from June 2015 until March 29, 2017, when Philip Ramstack, Chief Executive Officer – Operations, and Ben Nystrom, Chief Executive Officer – Sales and Marketing, discharged him from the employment for using the employer's computer equipment and email system to encourage other employees to leave the company. Mr. Manwarren's immediate supervisor was Katie Techen, Controller. Mr. Ramstack had hired Mr. Manwarren to help build Metal Works' operations. Mr. Ramstack had worked with Mr. Manwarren at previous employment.

At the start of Mr. Manwarren's employment at Metal Works, the employer provided Mr. Manwarren with an employee handbook. The policy contained a policy prohibiting "solicitation" of company employees during times when the soliciting employee or the employee being solicited was supposed to be performing work on behalf of the company. While the language of the policy indicates that it applies to solicitation for charitable, sporting, or social causes, the employer took an expansive view of the policy and deemed Mr. Manwarren to have violated the solicitation policy by encouraging other employees to leave the company.

The handbook also contained a Standards of Conduct section. Included in the standards of conduct was a prohibition against the following: "Insubordination, slowing down, interfering with business operations or directing others to do so." The employer took an expansive view of the provision and deemed Mr. Manwarren to have interfered with business operations by encouraging coworkers to leave the company.

The handbook also contained a Company Communications Systems section. The policy indicated that employees were given access to telephones, voicemail, facsimile machines, email and the Internet to enhance their job performance and facilitate effective business communications. The policy allowed limited "personal use" of the communications systems so long as the use did not negatively affect an employee's job performance. The policy also warned employees that they should have no expectation of privacy when using the company's communication systems.

On or about March 20, 2017, the employer received a complaint from a customer service manager regarding the impending quit of a customer service representative and Mr. Manwarren's role in the employee's decision and plans to leave Metal Works. The complaint prompted the employer to investigate the matter by speaking to affected employees and by reviewing Mr. Manwarren's email correspondence with affected employees. The investigation revealed that Mr. Manwarren had not only encouraged the customer service representative to leave Metal Works, but had encouraged her to seek employment with a company for which Mr. Manwarren's wife worked. Mr. Manwarren had provided the particulars of the prospective new employment, including wage information, and had counseled the customer service representative on how best to present herself to the prospective employer. The investigation also revealed that Mr. Manwarren had used the employer's email system in August 2016 to bring an outside job opportunity to the attention of another employee. When the employer interviewed Mr. Manwarren regarding his conduct in encouraging other employees to leave the company, Mr. Manwarren was intentionally dishonest. Mr. Manwarren denied the allegations until the employer confronted him with his email correspondence with the affected employees.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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 of 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 weight of the evidence in the record established that Mr. Manwarren knowing and intentionally used the employer communication systems equipment to encourage at least three fellow employees to leave Metal Works, to facilitate their departure, and to facilitate prospective new employment. Mr. Manwarren knew at the time he engaged in such acts that it was contrary to the interests of Metal Works to be encouraging other staff to leave the company. Mr. Manwarren knowingly and intentionally acted contrary to the interests of the employer by being intentionally dishonest with the employer during the employer's investigation of the matter. Mr. Manwarren's actions demonstrated intentional and substantial disregard of the employer's interests and constituted misconduct in connection with the employment.

Because Mr. Manwarren was discharged for misconduct in connection with the employment, he is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Manwarren must meet all other eligibility requirements. The employer's account will not be charged.

DECISION:

The April 13, 2017, reference 01, decision is affirmed. The claimant was discharged on March 29, 2017 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/scn