

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHELE A HOWARD
Claimant

APPEAL NO. 11A-UI-09448-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOWA CIVIL RIGHTS COMMISSION
Employer

OC: 06/12/11
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Michele Howard filed a timely appeal from the July 11, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 4, 2011. Ms. Howard participated. Beth Townsend, Executive Director, represented the employer and presented additional testimony through Diana Sisler and Don Grove. Exhibits One through Five 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: Michele Howard was employed by the Iowa Civil Rights Commission as a full-time Civil Rights Specialist from 2007 until June 16, 2011, when Beth Townsend, Executive Director, discharged her for violating the employer's written e-mail policy. Ms. Howard has attended law school.

Toward the end of May 2011, Ms. Townsend was investigating another matter when it came to her attention that Ms. Howard had been sending and receiving inappropriate e-mail to others within and outside the Iowa Civil Rights Commission. Ms. Townsend requested copies of Ms. Howard's e-mail from the employer's Information Technology staff, received the material on May 29 or 30 and concluded her review of the material on June 3 or 4. The employer interviewed Ms. Howard on June 7 and suspended her that day pending completion of the employer's investigation. On June 16, the employer notified Ms. Howard that she was discharged from the employment.

On March 1, 2011, Director Townsend had instituted written work rules for the Iowa Civil Rights Commission. On that same day, Ms. Howard executed written acknowledgment of receipt of the work rules and her obligation to read them. The written work rules contained a provision regarding e-mail, as follows:

Email may be considered public record, with the exception of emails related to confidential material that is otherwise protected. Employees should have no expectation of privacy in anything they store, send or receive in the ICRC email system. The ICRC monitors emails without prior notice. The ICRC email system shall not be used to: create or distribute messages that include any of material that is offensive, pornographic, expresses religious or political views, chain letters, or is harassing. ICRC e-mail should be used for ICRC official business only to the greatest extent possible.

When Ms. Townsend reviewed Ms. Howard's email from the beginning of March onward, she found many disturbing elements. Ms. Howard and two coworkers had created, and regularly used, pet names for other staff at the Civil Rights Commission. Several of the pet names were derogatory. They included Monster, Psycho, Roid Rage, Stoned Intern, Homeless McGee, Bag Lady, Tupac, Eliza Doolittle, Extreme Makeover, Mole Hunter, Albino, Rain Man. and Trash Box. Ms. Howard and her two colleagues created and used two pet names for Director Townsend: Sarg and Night Ranger. Ms. Howard and her colleagues created and used a pet name for Don Grover, Supervisor of Investigations and Screening: Teenwolf. Ms. Howard sent and received e-mail correspondence that made fun of and/or ridiculed obese people, gay, transgendered and/or transvestite people, elderly people, Walmart customers, African-American men, white high school students, white men, and white people generally. Ms. Townsend discovered that Ms. Howard had sent or received more than 1,600 e-mail messages between the beginning of March and the end of May. During the same period, Ms. Howard's 17 coworkers had sent or received an average of 50 e-mails. Ms. Townsend discovered that 98 percent of Ms. Howard's e-mail correspondence was non-work-related. Ms. Howard's correspondence included instances of profanity and a solicitation to her coworkers to join her for an unauthorized break. Ms. Howard's e-mail correspondence occurred in the context of the employer's written e-mail policy and in the context of the employer's repeated warnings that the Des Moines Register could at any time make a public records request for e-mail correspondence.

REASONING AND CONCLUSIONS OF LAW:

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 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). In this case, the employer discharged Ms. Howard within a reasonable period after concluding its investigation. The discharge was based on a current act.

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 an ongoing willful disregard for the work rules, mandate, integrity, and reputation of the Iowa Civil Rights Commission. While employed by an agency whose purpose is to confront, remedy, and eliminate discrimination, Ms. Howard engaged in a remarkably broad, persistent campaign of discrimination and otherwise offensive conduct through her abuse of the employer's electronic communication system. What is even more remarkable is Ms. Howard's effort to minimize, or excuse away, the discrimination and offensive conduct she directed at various individuals and groups. Ms. Howard's conduct indicated a willful and wanton disregard of the employer.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Howard was discharged for misconduct. Accordingly, Ms. Howard is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Howard.

DECISION:

The Agency representative's July 11, 2011, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs