IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MARIA OHL
Claimant

CITY OF MASON CITY
Employer

APPEAL NO: 12A-UI-11434-B

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/19/12
Claimant: Appellant (1)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Maria Ohl (claimant) appealed an unemployment insurance decision dated September 10, 2012, reference 01, which held that she was not eligible for unemployment insurance benefits because she was discharged from the City of Mason City (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a hearing was held in Mason City, Iowa on November 19, 2012. The claimant, the appellant and the party who requested the in-person hearing, did not participate in the hearing. The employer participated through Perry Buffington, Director of Human Resources; Michael Lashbrook, Chief of Police; and Cheri Collins, Human Resources Assistant/Clerk of Civil Service Commission. Employer's Exhibits One and Two were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

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 as a full-time police officer on January 12, 2001. She was placed on paid leave on September 24, 2010 and discharged on August 4, 2011 for neglect of duty, insubordination, interfering with an investigation, and improperly compromising official police records by copying, altering and possessing an audio recording from a confidential informant.

On December 26, 2009, the claimant responded to a disturbance call and encountered a person who provided her with alleged tips relating to the 1995 disappearance of Jodi Huisentruit and the 1999 murder of Gerald Best. These cases remain open and the informant alleged that three Mason City police officers and one former DCI Agent were involved in the murder or a cover-up of one or both of these cases. The person who provided this information was intoxicated. At

the time of the interview, the claimant was wearing a microphone that was connected to her car audio/visual recording system.

After recording the conversation and before returning to the police station, the claimant used a personal recorder to re-record the conversation with the informant but she added personal comments to her recording. Once she returned the police car to the police station, the recording was automatically downloaded to the police server and remains in its archives. Patrol car recordings are not reviewed unless there is cause to do so. The claimant never provided the information and/or her recording to her employer or anyone else in law enforcement and it only came to light when she was deposed in a lawsuit on September 22, 2010.

The claimant's brother-in-law, Pastor Shane Philpott, sued the City for defamation of character and religious discrimination. The claimant was deposed in this case and in her deposition, she testified that she had received information from an informant alleging the involvement of the Mason City Police Department in the cases involving Huisentruit and Best. Chief of Police Michael Lashbrook called the claimant into his office on September 23, 2012 and questioned her as to the testimony she provided. The claimant admitted that she had received information alleging that certain members of the Mason City Police Department were involved in the alleged disappearance, murder and/or cover-up of these events. She acknowledged that she had a recording of this information. Chief Lashbrook was not one of the individuals alleged to be involved; he started employment with Mason City in 2007 when he was named as the Chief of Police. The claimant secretly recorded this meeting.

Chief Lashbrook held a second meeting with the claimant on September 24, 2012 and she provided two recordings. One was the altered recording from 2009 and the other was a recording of the meeting held on the previous day. At this time, the claimant was placed on paid administrative leave pending an internal investigation of her conduct relating to the receipt, retention, and release of information obtained from the confidential informant.

Chief Lashbrook retained the services of Neil Shultz, a retired Deputy Sheriff from Polk County, to conduct the internal investigation of the claimant's conduct. Mr. Shultz interviewed the claimant and she became very tearful and expressed fear of retaliation. Consequently, Mr. Shultz recommended the employer send the claimant to a Fitness for Duty assessment. Dr. Eva Christiansen conducted the assessment and determined that the claimant was not fit for duty with the Mason City Police Department, although this was not based on a particular medical diagnosis.

A separate investigation was conducted regarding the information obtained from the claimant's informant and no credible evidence was found to support the informant's claims.

At some point, the claimant filed a lawsuit against the Mason City Police Department for sex discrimination, religious discrimination and retaliation. The final separation was delayed due to a possible settlement of the legal case. When it was determined that the case was not going to be promptly resolved, the employer went forward with termination proceedings. The claimant subsequently appealed her termination to the Mason City Civil Service Commission who held a hearing. The Commission found there was substantial evidence to support the claimant's termination in a decision dated October 7, 2011. The claimant appealed the Commission's ruling in District Court but subsequently dismissed that appeal.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

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.

871 IAC 24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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 to prove the discharged employee is disqualified for benefits due to work-related misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on August 4, 2011 for neglect of duty, insubordination, interfering with an investigation, and improperly compromising official police records by copying, altering and possessing an audio recording from a confidential informant. The claimant failed to participate in the hearing and her actions are certainly questionable. The evidence confirms the claimant was not acting in the best interest of the employer and the public at large.

The only remaining issue is whether the discharge occurred for a past act. While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge or disciplinary suspension for misconduct cannot be based on such past act(s). The termination or disciplinary suspension 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).

The employer first learned about the claimant's conduct on September 22, 2010 and the employer interviewed her on the following day and suspended her two days later. Consequently, the discharge was not based on a past act. The claimant's conduct shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

DECISION:

The unemployment insurance decision dated September 10, 2012, reference 01, is affirmed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld 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.

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Susan D. Ackerman
Administrative Law Judge

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Decision Dated and Mailed

sda/css