IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

NANCY J KUTSCH
Claimant

MI-T-M CORPORATION
Employer

APPEAL NO. 11A-UI-15037-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/28/11
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Nancy Kutsch filed a timely appeal from the November 16, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on January 13, 2012. Ms. Kutsch participated and was represented by Mark Sullivan, attorney at law. Susan Haxmeier, human resources manager, represented the employer. Exhibits One, Two, Three, A, B, and C, 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: Nancy Kutsch was employed M-T-M Corporation as a full-time invoicing clerk from 2005 until October 19, 2011, when Susan Haxmeier, human resources manager, discharged her from the employment for unauthorized personal use of the employer's e-mail system. Steve Gall, director of shipping and receiving of materials, was Ms. Kutsch's immediate supervisor.

At some point during the last week of the employment, a floor supervisor noticed that Ms. Kutsch was spending more time than necessary sending e-mail messages on a work computer despite being on light-duty status and wearing wrist braces in connection with recent carpal tunnel surgery. The floor supervisor notified Mr. Gall. Mr. Gall brought the matter to the attention of Susan Haxmeier, human resources manager. Ms. Haxmeier had the employer's information technology (I.T.) department pull Ms. Kutsch's e-mail correspondence going back to June 2011.

On October 18, the IT manager provided the e-mail records to Ms. Haxmeier. Ms. Kutsch had used the employer's e-mail system over the course several months to conduct a work search, to talk to a girlfriend about her work search, and to correspond with one or more prospective employers. In February, Ms. Kutsch had sent an e-mail message to her girlfriend in which message Ms. Kutsch wrote, "My boss finally left early enough yesterday that I could get on and

pull up McGraw and resubmit my info." In May 2011, Ms. Kutsch sent a message to her girlfriend about some job openings she had noticed at another company. Ms. Kutsch wrote, "I noticed them at lunch. If my boss leaves in a few minutes, I'll try to get the app in." In May, Ms. Kutsch wrote a message to her girlfriend in which she wrote, "I should be paying freight bills right now, but to heck with it." Ms. Kutsch went on to discuss using her friend as a reference in connection with a job Ms. Kutsch had applied for. Ms. Kutsch continued her work search activities through the employer's computer into October. In an e-mail message Ms. Kutsch had sent in June, Ms. Kutsch was unhappy with the employer's handling of her workers' compensation claim and referred to Ms. Haxmeier as a bitch. In another June e-mail, Ms. Kutsch referred to the floor supervisor, Chuck Klesne, as "upchuck." In another June e-mail, Ms. Kutsch was again unhappy with the employer's handling of her workers' compensation claim. In that message, Ms. Kutsch said that she was "sick of management" and that the doctor was "on their ass" with regard to giving her breaks.

The employer's written electronic communications policy indicated that the system was to be used for business-related purposes only, that any correspondence would be treated as business information, and that the system was not to be used for personal entertainment. Ms. Kutsch was aware of the policy. The written policy was not strictly enforced. The employer had tolerated employees sending non-work-related e-mail messages related to jewelry parties, Tupperware parties, and kids' soccer club fundraising activities. The employer had put an end to sports gambling via its computer system once the employer became aware of it.

The employer's investigation of Ms. Kutsch's e-mail correspondence and discharge of Ms. Kutsch occurred in the context of changes in Ms. Kutsch's medical condition. Ms. Kutsch had undergone surgery on one wrist in June and had surgery on the other in September. While Ms. Kutsch's regular duties had been computer-intensive, the light-duty work the employer provided involved packaging parts and placing stickers. On October 18, 2011, Ms. Kutsch had a follow-up appointment with the workers' compensation doctor and was released by the workers' compensation doctor to return to her typing duties. The employer was aware of the release. After the appointment, Ms. Kutsch returned to work and spoke to Mr. Gall. Ms. Kutsch asked whether she would be allowed to return to her prior regular duties the next day. Mr. Gall told her no, that he did not want her to return to her prior duties, that that there would be further discussion regarding what work the employer wanted Ms. Kutsch to perform. The employer wanted Ms. Kutsch to work in the parts department. Ms. Kutsch indicated that she was willing to try the duties in the parts department.

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).

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 establishes that Ms. Kutsch acted with willful and wanton disregard of the employer's interests when she used the employer's e-mail system over the course of several months to conduct a job search and apply for positions outside Mi-T-M Corporation. The e-mails received into evidence indicate that Ms. Kutsch was knowingly and intentionally violating the employer's electronic communications policy and that Ms. Kutsch took measures to hide her conduct from her supervisor. The evidence concerning the work search activities were sufficient to establish misconduct in connection with the employment. The additional e-mails referring to Ms. Kutsch as a bitch and to Mr. Klesne as "upchuck" cannot be excused away as mere expression of frustration in the context. These alone may not have been

sufficient to establish misconduct sufficient to disqualify Ms. Kutsch for unemployment insurance benefits, but they further indicate Ms. Kutsch's disregard of the employer's interests.

The weight of the evidence fails to establish that unauthorized use of the employer's e-mail system was as rampant as Ms. Kutsch suggests or that her work search activity was of the same category as kids' soccer club, Tupperware, or jewelry party solicitations. The e-mails received into evidence indicate that Ms. Kutsch knew that her work search activity was not in the same category and that this is why she took pains to hide the activity from her supervisor.

The weight of the evidence fails to support Ms. Kutsch's assertion that she was discharged because she was released to return to her previous duties. The evidence indicates that the release came on October 18. The employer had already noticed the excessive computer use and had begun its investigation. In addition, Ms. Kutsch had indicated a willingness to try the duties in the parts department.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Kutsch was discharged for misconduct. Accordingly, Ms. Kutsch 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. Kutsch.

DECISION:

The Agency representative's November 16, 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 shall not be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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