

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SASCHA R MORGAN

Claimant

APPEAL NO. 13A-UI-12750-JTT

**AMENDED
ADMINISTRATIVE LAW JUDGE
DECISION**

ALLIED BLENDING & INGREDIENTS INC

Employer

OC: 10/13/13

Claimant: Respondent (2)

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

Iowa Code Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 7, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 6, 2013. Claimant Sascha Morgan did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Amy Coyle represented the employer and presented additional testimony through Darlene Young. The administrative law judge took official notice of the administrative file documents submitted for and generated in connection with the fact-finding interview. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to the claimant. Exhibits One through Six were received into evidence.

On December 11, 2013, Ms. Morgan contacted the Appeals Section with regard to the hearing that went forward without her on December 6, 2013. On December 13, 2013, the administrative law judge spoke with Ms. Morgan. At that time, Ms. Morgan advised that she had found her unopened hearing notice on the evening of December 10, 2013 while she was cleaning. Ms. Morgan advised that the envelope, along with other correspondence, had fallen behind a piece of furniture. The administrative law judge concluded that there was good cause to reopen the record so that the claimant could participate.

The additional proceeding took place on December 20, 2013, by agreement of the parties. Ms. Morgan participated. Ms. Coyle again represented the employer and presented testimony through Ms. Young.

The parties stipulated that the employer participated in the fact-finding interview that led to the November 7, 2013, reference 01, decision that allowed benefits.

ISSUES:

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

Whether the claimant was overpaid benefits.

Whether the claimant is required to repay benefits.

Whether the employer's account may be charged for benefits paid to the claimant to this point or beyond.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Sascha Morgan was employed by Allied Blending & Ingredients, Inc., as a full-time operations assistant from January 2012 until October 16, 2013, when Randy Schmelzel, President, discharged her from the employment for inappropriate use of the employer's email system during working hours. Ms. Morgan's work hours were 8:00 a.m. to 5:00 p.m., Monday through Friday. Ms. Morgan's immediate supervisor was Jeff Brunenn, Plant Manager.

The employer had a written computer and email usage policy. The policy indicated that the email system was intended for business use. The policy indicated that email usage would be monitored. The policy prohibited transmission of sexually explicit images, messages and cartoons.

On October 4, 2013, Mr. Schmelzel directed Joe Landis, Information Technology Administrator, to review email correspondence that Rudy Leemans, Chief Financial Officer, had sent or received via the employer's email system. Mr. Schmelzel received a report from Mr. Landis on October 15, 2013. The I.T. review revealed inappropriate and excessive email correspondence involving Ms. Morgan, Mr. Leemans and Kristina Quint, Network/Helpdesk Support Specialist. At the same time Ms. Morgan was sending and receiving excessive, non-work related, inappropriate email messages, she was neglecting her work duties. During the period of August 13, 2013 through September 19, 2013, Ms. Morgan had neglected to submit a bill of lading to a vendor, which resulted in the employer having to issue a \$500,000.00 payment to the vendor during a single week. Ms. Morgan was responsible for processing billing materials in connection with receipt of product from overseas vendors. Ms. Morgan concedes that she "dropped the ball" in connection with bills of lading.

The employer has provided examples of the offending correspondence. On the morning of August 20, 2013, Ms. Morgan engaged in non-work related email correspondence with Ms. Quint about a personal relationship involving a male coworker identified as Q, Quiante Tinder.

On the morning of September 13, 2013, Ms. Morgan and Ms. Quint engaged in additional non work-related correspondence.

On the afternoon of September 19, Ms. Morgan emailed Ms. Quint a photograph that appeared to show two llamas copulating. Ms. Morgan included the subject line, "Hump Day!" and commented, "Gives a whole new meaning to "hump day", doesn't it? LOL!!!!" Ms. Quint forwarded the email to Mr. Leemans.

On the morning of September 27, Ms. Morgan and Ms. Quint corresponded about Ms. Quint's plans for "date night" that evening.

On the morning of September 29, Ms. Quint sent a message to Ms. Morgan about an injury she had suffered at home. On the morning of September 30, Ms. Morgan continued that

conversation. Ms. Morgan and Ms. Quint continued to engage in non-work related email throughout that day and turned the discussion to Q's separation from his spouse, romantic involvement with Q, and Ms. Quint being verbally reprimanded in connection with Q spending two hours in her office for a purported lunch break.

On October 7, 8, 9, 11 and 14, Ms. Morgan and Ms. Quint spent corresponding, at one point for hours, about the romantic intrigue between Ms. Quint and Mr. Tinder.

On July 15, 2013, Mr. Leemans had sent an email message to employees reminding them that personal use of the employer's electronic equipment should be kept to a strict minimum and reminding employees that the employer monitored email correspondence.

The employer had issued a reprimand to Ms. Morgan in August 2012 for excessive use of the employer's email system for non-work related purposes on company time. In connection with that reprimand, Ms. Morgan signed her acknowledgment of the following:

I, Sascha Morgan, acknowledge that I have been informed of the rules concerning inappropriate use of company computers and in appropriate E-Mail and that such use in the future could be subject to disciplinary action up to termination.

Ms. Morgan established a claim for benefits that was effective October 13, 2013 and, so far, has received \$3,286.00 in benefits for the period of October 13, 2013 through December 7, 2013.

The employer fully participated in the fact-finding interview that led to the November 7, 2013, reference 01, decision that allowed benefits.

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 employer has presented sufficient evidence to establish ongoing abuse of the employer's email system for non-work related and inappropriate workplace correspondence. The evidence indicates that Ms. Morgan made a substantial contribution to that correspondence. Her contribution included that photograph of the copulating animals. Ms. Morgan's ongoing misuse of the employer's email system occurred in the context of a prior written warning for similar behavior. The employer has warned Ms. Morgan that continued personal use of the email system could subject her to discharge from the employment. Ms. Morgan elected to continue the conduct despite that warning and the reminder that Mr. Leemans sent in July 2013.

Ms. Morgan made allegations about the workplace that need not be addressed in the context of her discharge for misconduct based on her abuse of the employer's work email system. The included allegations about other staff abusing the email system and allegations of sexual harassment. The weight of the evidence indicates that Ms. Morgan's discharge was based solely on her misuse of the employer's email system.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Morgan was discharged for misconduct. Accordingly, Ms. Morgan 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 unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid \$3,286.00 in benefits for the period of October 13, 2013 through December 7, 2013.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

DECISION:

The Agency representative's November 7, 2013, reference 01, decision is reversed. 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 for benefits. The claimant was overpaid \$3,286.00 in benefits for the period of October 13, 2013 through December 7, 2013. The claimant must repay that amount.

Both parties have appeal rights in connection with this amended decision. The appeal instructions and deadline information are set forth on the first page of the decision that contains the parties' mailing addresses.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs/pjs