

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SANDY SHOOP
Claimant

APPEAL NO. 12A-UI-13132-VST

BANKERS TRUST CO
Employer

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/30/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a decision of a representative dated October 22, 2012, reference 01, which held that the claimant was ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on December 4, 2012. The claimant participated personally. The employer participated by Sharon Gaddy-Hanna, vice president of staffing and development officer, and Tina McGuire, assistant vice president of deposit operations.

ISSUE:

Whether the claimant was discharged for a current act of misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a financial institution. The claimant was hired on January 6, 2003. She was a full-time account analysis specialist. Her last day of work was October 4, 2012. She was terminated on October 4, 2012, for violation of the employer's policy on the use of e-mail for personal reasons.

Tina McGuire, assistant vice president of deposit operations, did an audit of the claimant's e-mail. The audit was from July 13, 2012, through September 13, 2012. The audit showed that the claimant sent 4,000 e-mails on the employer's computers. Of those 4,000 e-mails, 2,780 were of a personal nature. Ms. McGuire got the result of the audit on September 13, 2012. She needed three full days to read all of the e-mails. When she finished, she turned over her results to human resources and her supervisor.

The employer continued its investigation. The claimant was not told about the investigation nor did she know that an audit had been conducted. The claimant continued to work. The claimant was not discharged until October 4, 2012.

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8) See also *Greene v. EAB*, 426 N.W.2d 659 (Iowa App. 1988) The employer has the burden of proof to show misconduct.

The claimant is eligible for unemployment insurance benefits. The reason the claimant is not disqualified is because the employer did not discharge the claimant for a *current* act of misconduct. The employer had the information by September 16, 2012, at the latest, that the claimant was using the employer's e-mail to conduct personal business. Even allowing a reasonable time for investigation, the employer still waited until October 4, 2012, to terminate the claimant. Had the employer informed the claimant that an investigation was ongoing, the result might have been different. In this case, however, the employer waited 18) days to take any kind of action. The claimant continued to work for the employer. Under these circumstances, there was no discharge for a current act of misconduct. Benefits are allowed if the claimant is otherwise eligible.

The employer indicated that its address has changed. The administrative law judge cannot change the employer's address of record. That must be done by the employer. The employer can change its address of record by accessing its account at <https://www.myiowauai.org/UITIPTaxWeb/>.

DECISION:

The decision of the representative dated October 22, 2012, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/bjc