IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KIMBERLY J MOCK
Claimant

MARK MCMANUS DEVELOPMENT CORP
Employer

APPEAL NO. 11A-UI-00305-HT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/24/10
Claimant: Respondent (1)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Mark McManus Development Corporation (McManus), filed an appeal from a decision dated December 28, 2010, reference 01. The decision allowed benefits to the claimant, Kimberly Mock. After due notice was issued, a hearing was held by telephone conference call on March 14, 2011. The claimant participated on her own behalf. The employer participated by President Mark McManus.

ISSUE:

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

FINDINGS OF FACT:

Kimberly Mock was employed by McManus from September 28, 2009 until October 22, 2010 as a full-time clerical worker. Immediately after her hire the employer realized she was not as proficient in some of the computer programs as she had stated on her résumé. It elected to maintain her as an employee and train her in these areas rather than discharge her.

President Mark McManus maintained that Office Manager Deborah McManus had given verbal warnings to the claimant about her inability to do her assigned tasks or perform her job duties, but no specific dates of these alleged warnings could be provided. The claimant indicated Ms. McManus had been "venting" at one point in early 2010 and said she did not feel Ms. Mock was giving her the help she needed and was not "grasping" the job as well as the employer wanted. But that had been the only reference made by the employer about any work performance issues.

McManus also maintained the claimant had "lost" some computer records and did not report the incident. Ms. Mock admitted that one day in approximately August 2010, she went to access these records and could not find them on the computer. This was immediately reported to Ms. McManus who said she was too busy to deal with it at that time. A few days later Ms. Mock again reported the loss but still nothing was done until Mr. McManus needed the records and they were not available.

The final incident was an allegation the claimant was sitting at her desk "doing nothing but staring at the computer screen all day" on October 21, 2010. This was reported to the president by Ms. McManus but the claimant denied she was "doing nothing." She stated if Ms. McManus did not have any specific work for her to do, she would routinely access computer records to try and familiarize herself with the different aspects of the business since she had received no formal training on the job.

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 to establish the claimant was discharged for substantial, job-related misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The employer has been unable to provide any specific information about the dates the claimant was allegedly given warnings about her job performance. Claimant was aware of only one incident in February 2010 when Ms. McManus admitted she was "venting" some frustration. That incident does not appear to have been a formal warning and is too distant in time to.

The claimant denied she was sitting at her computer "doing nothing" on October 21, 2010, and the employer did not provide testimony from the only witness, Deborah McManus. In addition, the employer failed to provide any information regarding the verbal warnings the claimant allegedly received from Ms. McManus. If a party has the power to produce more explicit and

direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The administrative law judge concludes that the hearsay evidence provided by the employer is not more persuasive than the claimant's denial of such conduct. The employer has not carried its burden of proof to establish that the claimant committed any act of misconduct in connection with employment for which she was discharged. Misconduct has not been established. The claimant is allowed unemployment insurance benefits.

The employer has failed to meet its burden of proof by providing any specific information regarding prior warnings to the claimant and any eyewitnesses to her allegedly "doing nothing" while sitting at her computer. Disqualification may not be imposed.

DECISION:

The representative's decision of December 28, 2010, reference 01, is affirmed. Kimberly Mock is qualified for benefits, provided she is otherwise eligible.

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Bonny G. Hendricksmeyer
Administrative Law Judge

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Decision Dated and Mailed

bgh/css