

**IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI**

**BILLY A FISHER  
17502 55<sup>TH</sup> AVE  
ST CHARLES IA 50240**

**WELLS FARGO BANK N A  
c/o SHEAKLEY UNISERVICE  
PO BOX 1160  
COLUMBUS OH 43216-1160**

**Appeal Number: 04O-UI-01127-DT  
OC: 10-19-03 R: 02  
Claimant: Appellant (2)**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct  
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The claimant, Billy A. Fisher, filed a timely appeal from an unemployment insurance decision dated November 13, 2003, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held under 03A-UI-13391-RT on December 16, 2003, with the claimant participating. The employer, Wells Fargo Bank N A, did not participate in that hearing because the employer did not call in a telephone number, either before the hearing or during the hearing, where any witnesses could be reached for the hearing, as instructed in the notice of appeal. Until November 1, 2003, the employer had been represented by TALX UC eXpress, and the notice of the December 16 hearing had inadvertently still been sent to that employer representative group. Therefore, upon receiving

the decision of the administrative law judge from that hearing, the employer's new representative group, Sheakley Uniservice, appealed to the Employment Appeal Board, which then remanded the matter back for a new hearing in which the employer could participate with notice being sent to the correct employer representative.

Hearing notices were mailed to the parties for a new telephone hearing under the current appeal number to be held at 2:00 p.m. on February 24, 2004. The employer's notice was properly mailed to Sheakley Uniservice at its address of record; in addition to the instructions stated on the hearing notice, Sheakley Uniservice is also well aware of the need to call in a telephone number in advance of the hearing if the employer wants to participate in the hearing. The employer failed to respond to the hearing notice and provide a telephone number at which a representative could be reached for the hearing and did not participate in the hearing. The claimant responded to the hearing notice and indicated that he would participate in the hearing. When the administrative law judge contacted the claimant for the hearing, he requested that the administrative law judge make a determination based upon the record created in the December 16, 2003 hearing and reinstate the decision issued in that matter. Based on the prior hearing record, Agency unemployment insurance records for the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

#### FINDINGS OF FACT:

The claimant was employed by the employer as a full-time mortgage loan processor from October 31, 2001 until he was discharged on October 15, 2003. The claimant was discharged for performance issues, namely, making errors on loans. The claimant was assigned to do the loan processing for Michigan and Illinois with another co-worker. However, the other co-worker left, and the claimant was the only one doing the loan processing for those two states. As a result of the increased workload, the claimant began working 50 to 60 hours per week and this increased his errors. He asked for help, but no help was provided until one or two weeks before his discharge. The claimant had received a final warning approximately September 1, 2003 about these performance issues, but the claimant was working to the best of his abilities and was overloaded with work and made a few errors. The claimant received no other warnings or disciplines except an informal warning in June 2003 for attendance, but the claimant was discharged for performance issues. The claimant was on a final warning, and the claimant would meet daily with his immediate manager and talk to the manager about how he was doing. The manager would tell the claimant that he was doing acceptably, but nevertheless the claimant was discharged.

Pursuant to his claim for unemployment insurance benefits filed effective October 19, 2003, the claimant has received no unemployment insurance benefits. Iowa Workforce Development records show no payments made to the claimant and no weekly claims.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

The administrative law judge concludes that the claimant was discharged by the employer and he did not voluntarily quit. The claimant so testified and the employer did not participate in the hearing to provide evidence otherwise. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code Section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer did not participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of his duties and/or evincing a willful or wanton disregard of the employer's interests and/or in carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct.

The claimant credibly testified that he was discharged for performance issues when he made a few errors on loans. The claimant also credibly testified that he made these errors because a co-worker who with the claimant was assigned to do loan processing for Michigan and Illinois left leaving the claimant to do the work of both. Because of the increased workload and the claimant's additional hours working 50 to 60 hours per week, the claimant made a few errors. The claimant was working to the best of his abilities. The claimant was even meeting daily with his immediate manager who kept telling the claimant his work was acceptable. Accordingly, the administrative law judge concludes that the evidence establishes that, at most, the claimant was discharged for unsatisfactory conduct, failure in good performance, as a result of inability or incapacity or ordinary negligence in isolated instances which are not disqualifying misconduct. It is true that the claimant was on a final warning given to him approximately September 1, 2003, but the claimant had asked for help to assist in the mortgage processing when his co-worker left and help was not provided until one or two weeks before the claimant was discharged. Further, during that time the claimant was meeting daily with his manager and being told that he was doing fine. Therefore, the administrative law judge concludes that the claimant was discharged, but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment

compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received no unemployment insurance benefits since separating from his employer herein on or about October 15, 2003 and filing for such benefits effective October 19, 2003. Workforce Development records show no payments and no weekly claims. Even if the claimant had received unemployment insurance benefits, he would not be overpaid such benefits because the administrative law judge concludes, as noted above, that the claimant's separation from the employment was not disqualifying.

DECISION:

The representative's decision of November 13, 2003, reference 01, is reversed. The claimant, Billy A. Fisher, is entitled to receive unemployment insurance benefits provided he is otherwise eligible. The claimant has received no unemployment insurance benefits and even if he had, he would not be overpaid any unemployment insurance benefits as a result of his separation from the employer herein.

ld/kjf