**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**TANNER K LOYD**
Claimant

**WELLS FARGO BANK**
Employer

**APPEAL NO. 13A-UI-00093-S2T**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 12/02/12**
**Claimant: Respondent (1)**

Section 96.5-1 – Voluntary Quit
Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Wells Fargo Bank (employer) appealed a representative's December 28, 2012 decision (reference 02) that concluded Tanner (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for February 5, 2013. The claimant participated personally. The employer was represented by Frankie Patterson, Employer Representative, and participated by Kari Sullivan, Call Center Sales Manager, and Nick Gallick, Sales Supervisor.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on October 5, 2009, as a full-time telephone sales home mortgage consultant. The claimant may have signed for receipt of the employer's handbook. In April 2012, the employer did not have a computer for the claimant to use. Shortly after that the claimant took seven days of "paid time off" due to a family emergency. These days had repercussions months later when the claimant's numbers were down.

On June 26, 2012, the employer issued the claimant a verbal warning for having his funded point that had fallen within the bottom five percent. The employer told the claimant that he would be subject to a performance improvement plan. On August 28, 2012, the employer issued the claimant a written warning for performance improvement. The claimant's funded points were still in the bottom five percent. The employer notified the claimant that further infractions could result in termination from employment. The employer recognized that the claimant was trying but he lacked the ability to move work through quickly enough.

On October 23, 2012, the claimant's manager and supervisor met with the claimant. They told him that he should look for other employment because he was not a good fit at the company.

When the claimant questioned them, they told the claimant he would be terminated if he did not leave. The claimant worked with the human resources department to put together a resignation letter. On October 31, 2012, the claimant offered his letter of resignation effective November 14, 2012. The employer had planned to terminate the claimant on October 31, 2012. They allowed the claimant to work his two weeks of notice through November 14, 2012.

**REASONING AND CONCLUSIONS OF LAW:**

The first issue is whether the claimant voluntarily quit without good cause attributable to the employer. For the following reasons the administrative law judge concludes he did not.

871 IAC 24.26(21) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

If an employee is given the choice between resigning or being discharged, the separation is not voluntary. The claimant had to choose between resigning or being fired. The claimant's separation was involuntary and must be analyzed as a termination.

The issue becomes whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes he was not.

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 establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Misconduct connotes volition. A failure in job performance which results from inability or incapacity is not volitional and therefore not misconduct. Huntoon v. Iowa Department of Job Services, 275 N.W.2d 445 (Iowa 1979). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988). The employer discharged the claimant for poor work performance and has the burden of proof to show evidence of intent. The employer did not provide any evidence of intent at the hearing. The employer clearly stated in its testimony that the claimant was trying but lacked ability. The claimant's poor work performance was a result of his lack of ability. Consequently the employer did not meet its burden of proof to show misconduct. Benefits are allowed.

**DECISION:**

The representative's December 28, 2012 decision (reference 02) is affirmed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

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