

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

MARLENE E RIVAS
134 NEWCASTLE DRIVE
DES MOINES IA 50320

WELLS FARGO BANK
C/o SHEAKLEY/UNISERVICE
P O BOX 1160
COLUMBUS OH 43216-1160

Appeal Number: 04A-UI-11236-AT
OC: 09/19/04 R: 02
Claimant: Respondent (1)

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, 4th 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Wells Fargo Bank filed a timely appeal from an unemployment insurance decision dated October 6, 2004, reference 01, which allowed benefits to Marlene E. Rivas. After due notice was issued, a telephone hearing was held November 3, 2004. Ms. Rivas participated on her own behalf. Retentions Group Supervisor Patty Plotner and Retentions Group Team Leader Tracy Hilpibre participated for the employer, Wells Fargo Bank. Employer's Exhibit One was admitted into evidence. Documents submitted by the claimant were not admitted because the claimant submitted them too close to the date of hearing for the Appeals Bureau to be able to get copies to the employer. The documents have been retained with the file but have not been read or considered by the administrative law judge.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Marlene E. Rivas was employed by Wells Fargo Bank from August 4, 2003 until she was discharged September 8, 2004. She last worked as an inbound telephone sales representative. The final incident leading to the decision to discharge Ms. Rivas occurred on August 17, 2004. On that day, she submitted a claim for a commission for a sale to a customer. The employer determined that Ms. Rivas was not eligible for a commission because it felt that the customer himself had requested the sale. Based upon an unwritten policy prohibiting more than two claim issues per month, the employer discharged Ms. Rivas on September 8, 2004.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in this record establishes that Ms. Rivas was discharged for disqualifying misconduct. It does 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof. See Iowa Code Section 96.6-2. Among the elements that it must prove is that the final incident leading directly to the decision to discharge was both current and an act of misconduct. The employer's evidence fails on both elements.

More than three weeks elapsed from the final incident until the date of discharge. The employer has not provided a satisfactory explanation for the delay. All of the decision makers were located in the same community, even if not in the same building. The employer had not notified Ms. Rivas that it was contemplating discharging her. Furthermore, the employer's own testimony establishes that the policy for which Ms. Rivas was discharged was unwritten. The only explanation given was that it was a matter of ethics. The employer did not explain why an ethical standard would not be reduced to writing. The evidence persuades the administrative law judge that Ms. Rivas was unaware that she could be discharged if the employer disagreed with her claims more than twice a month. The employer's testimony also raised doubts in the administrative law judge's mind as to whether its witnesses believed that Ms. Rivas was deliberately submitting claims she knew to be improper or whether it was a matter of misunderstanding.

Since the evidence does not establish that the final incident leading directly to the decision to discharge Ms. Rivas was a current act of misconduct, no disqualification may be imposed.

DECISION:

The unemployment insurance decision dated October 6, 2004, reference 01, is affirmed. The claimant is entitled to receive unemployment insurance benefits, provided she is otherwise eligible.

shar/s