

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

JUDITH PRATT  
2400 HICKMAN RD APT 9  
DES MOINES IA 50310

WELLS FARGO BANK  
c/o TALX EMPLOYER SERVICES  
PO BOX 1160  
COLUMBUS OH 43216-1160

Appeal Number: 05A-UI-00955-JTT  
OC: 12/26/04 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct  
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

Wells Fargo filed a timely appeal from the January 19, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 14, 2005. Judith Pratt participated in the hearing. Wells Fargo participated through Kari Rau, Customer Service Supervisor.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Judith Pratt was employed by Wells Fargo Bank as a full-time customer service representative from July 25, 2001 until December 23, 2004, when the employer mailed her a letter in which it

asserted she had voluntarily quit her employment by being a “no-call, no-show” for three consecutive days in violation of a written company policy.

Ms. Pratt suffers from bipolar disorder. Ms. Pratt had made the Wells Fargo’s Leave Processing Department aware of her mental health status. Based on her mental health diagnosis, the Leave Processing Department approved Ms. Pratt for intermittent leave under the Family and Medical Leave Act (FMLA). The approval form indicated that Ms. Pratt must report all absences related to her health condition to her supervisor within two days of the absence in order for the absence to be approved under FMLA.

Shortly before her separation from the employment Ms. Pratt was re-assigned to work under a different supervisor after an FMLA absence. The re-assignment had actually taken place while Ms. Pratt was on FMLA leave and she returned to find she had been re-assigned. Ms. Pratt’s previous supervisor had been aware of Ms. Pratt’s mental health diagnosis and that it was the basis for her being approved for FMLA leave. Ms. Pratt’s new supervisor had not been formally advised of Ms. Pratt’s mental health diagnosis by the Leave Process Department or by Ms. Pratt, but was aware that Ms. Pratt had significant mental health issues.

Ms. Pratt had left work early on December 16 after an incident of bladder incontinence that was most likely associated with her mental health diagnosis. Ms. Pratt was then absent and on FMLA leave on Friday, December 17. During this time, Ms. Pratt was experiencing an episode of major depression as well as acute anxiety.

On Monday, December 20, Ms. Pratt came to work, but soon thereafter left work. She sat down at her computer, but could not focus. Instead, she was consumed with anxiety and could not cease sobbing. After 15-20 minutes, Ms. Pratt advised the supervisor on duty at that time that she needed to go on FMLA leave. Ms. Pratt did not contact the employer or appear for her shifts on December 21-23. During this time Ms. Pratt continued in the episode of major depression. Ms. Pratt was also experiencing significant difficulty with her psychotropic medications. Ms. Pratt’s medications were changed on December 24. On December 23, Wells Fargo mailed its letter indicated that Ms. Pratt had voluntarily quit her employment.

#### REASONING AND CONCLUSIONS OF LAW:

Because of the employer’s knowledge of Ms. Pratt’s mental health diagnosis and approval of FMLA leave, the administrative law judge concludes the separation from employment was a discharge rather than a voluntary quit. Ms. Pratt neither indicated an intention to quit the employment nor engaged in any overt act that evidenced an intention to sever the employment relationship. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698 (Iowa 1980) and Peck v. Employment Appeal Board, 492 N.W.2d 438 (Iowa App. 1996).

The question, then, is whether the evidence in the record establishes that Ms. Pratt was discharged for misconduct in connection with his employment based on excessive unexcused absences. 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, (7), (8) provide:

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).

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Because Ms. Pratt was discharged, the employer bears the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

In order for Mr. Pratt's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the employer must show that the absences were excessive and that the absences were unexcused. See 871 IAC 24.32-7. The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the employer must first show that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32-8. Absences related to issues

of personal responsibility such as transportation are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

Based a careful review of the evidence in the record, as set forth in the Findings of Fact, the administrative law judge concludes that the employer has failed to prove a final or current act of misconduct on the part of Ms. Pratt. Ms. Pratt had been approved for FMLA. The employer was aware that she suffered from bipolar disorder, but the Leave Processing Department did not communicate the necessary information to Ms. Pratt's new supervisor. When Ms. Pratt left work on December 20, 2004, she specifically indicated that she was leaving pursuant to her previously approved FMLA leave. The administrative law judge concludes that Ms. Pratt's final absence was an approved absence properly reported, and therefore does not constitute misconduct. See 871 IAC 24.32-8. The administrative law judge concludes that Ms. Pratt was discharged for no disqualifying reason. Accordingly, no disqualification will enter.

DECISION:

The representative's decision dated January 19, 2005, reference 01, is affirmed. The claimant is eligible to receive benefits provided she meets all other eligibility requirements.

jt/tjc