

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHELLEY M BODINE
Claimant

APPEAL NO. 08A-UI-10395-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA
Employer

**OC: 08/31/08 R: 02
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from a decision of a representative dated October 27, 2008, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on November 20, 2008. The claimant participated personally. The employer participated by Joel Potter and Peggy Brandt.

ISSUE:

The issue in this matter is whether the claimant was discharged for intentional misconduct in connection with her work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: The claimant worked for this employer from September 18, 2006 until September 4, 2008 when she was discharged from employment. Ms. Bodine worked as a full-time customer service representative 3 and was paid by the hour.

The claimant was discharged when she exceeded the permissible number of attendance infractions allowed under bank policy. The claimant was aware of the policy and had been warned prior to being discharged.

Under the bank's policy employees are subject to discharge if they accumulate 9 occurrences or 12 days' absences in a year, no matter what the reason. If employees report to work late more than one hour, the employer considers that to be a full one point infraction. Employees are only able to "roll off" infractions after a one-year period has elapsed from the date of the infraction. During the course of her employment Ms. Bodine had called in on each occurrence that she was unable to report for work. The claimant had been absent on some occurrences due to inclement weather and her inability to arrange transportation to the work place during inclement weather, illness of herself or her son and on one occasion the claimant had not been able to report to work as her son had been "missing" for a number of hours. The claimant's last

absence occurred when the claimant had been arrested for OUI. Although the claimant reported her impending absence she was unable to be released in time to report for work without accumulating the final attendance infraction point that resulted in her termination from employment.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Bodine was discharged for intentional disqualifying misconduct in connection with the employment. It does not.

Here the evidence establishes the claimant had been absent for work on a number of occasions but that the reasons for the absences were personally compelling in most instances. In all instances the claimant had provided notification to the employer of her inability to report for work or that she would be late. Under bank policy employees that report for work an hour or more late are assessed a full attendance infraction point. The claimant's final infraction point was assessed when she was unable to report for work without being one hour late on September 3, 2008. The most previous attendance infraction had taken place approximately two months earlier on July 11, 2008 when the claimant was unable to report for work for a compelling personal reason when her son had gone missing.

The employer has 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 insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily also serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate intentional, culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36 (Iowa 1992).

While an employer may establish attendance policies such as "no-fault policies," the policy that the employer has chosen is not in and of itself determinative of whether an individual is engaged in intentional disqualifying misconduct. The administrative law judge, after reviewing the record in this matter, concludes that the claimant's attendance infractions were primarily due to serious matters which required the claimant's attention or due to factors beyond her control such as inclement weather. It appears from the hearing record the claimant had made an effort to improve her attendance and to comply with company policy. Although the claimant was able to report to work on September 3, 2008 she would have been one hour late which would have resulted in her termination in any event under company policy.

The question before the administrative law judge is not whether the employer has a right to discharge an employee for these reasons but whether the discharge is disqualifying under the provisions of the Iowa Employment Security Act. While the decision to terminate Ms. Bodine may have been a sound decision from a management viewpoint, the administrative law judge concludes that the claimant's absences were not of such a recurring nature or magnitude so as to evince a willful disregard for the employer's interests and standards of behavior.

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.

For the reasons stated herein, the administrative law judge concludes the claimant's discharge took place under non disqualifying conditions. Intentional disqualifying misconduct has not been shown.

DECISION:

The representative's decision dated October 27, 2008, reference 01, is affirmed. The claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs