

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JESUS LOPEZ

Claimant

APPEAL NO. 09A-UI-03913-AT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK

Employer

OC: 02/08/09

Claimant: Respondent (2-R)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Wells Fargo Bank filed a timely appeal from an unemployment insurance decision dated March 4, 2009, reference 01, that allowed benefits to Jesus Lopez. After due notice was issued, a telephone hearing was held March 30, 2009 with Mr. Lopez participating. Human Resources Consultant Susan Thompson participated for the employer. Employer Exhibit One was admitted into evidence. The administrative law judge takes official notice of Agency benefit payment records.

ISSUE:

Was the claimant discharged for misconduct?

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: Jesus Lopez was employed by Wells Fargo Bank from June 7, 2004 until he was discharged on February 11, 2009. He last worked as a fraud specialist. On February 3, 2009 Mr. Lopez wrote a check on one of his two bank accounts, deposited that check at an ATM machine into his second checking account and then withdrew \$60.00 in cash from the second account. At the time, the first checking account had a negative balance of \$354.08. The second had a negative balance of \$33.56. Immediately after the withdrawal, Mr. Lopez withdrew \$60.00 in cash from the second account to pay for medicine. This occurred on a Tuesday. A direct deposit would not be made to Mr. Lopez' account until the following Friday. Mr. Lopez could have but did not check the balances of his two checking accounts at the ATM. He also could have inquired by telephone as to the accounts. Company policy forbids making false ATM deposits to receive immediate cash, and it prohibits check kiting. During the investigation of the incident Mr. Lopez told company investigators that he thought that there would be sufficient funds in the account by the time the check cleared.

The claimant has received unemployment insurance benefits since filing a claim effective February 8, 2009.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence establishes that the claimant was discharged for misconduct in connection with his employment. It does.

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 evidence establishes that Mr. Lopez could have but did not check on the balances of his two checking accounts before making the transactions. It establishes that he made a deposit from the account with the higher negative balance into the account with the lower balance, putting in enough to justify his \$60.00 cash withdrawal. It also establishes that he did not attempt to pay for the medicine by check. These facts persuade the administrative law judge that contrary to Mr. Lopez' assertions, he fully knew that he did not have sufficient funds in his checking accounts to cover his purchase. The administrative law judge discounts the claimant's argument of good-faith error. The evidence is sufficient to establish misconduct. Benefits are withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The question of whether the claimant must repay the unemployment insurance benefits he has already received is remanded to the Unemployment Insurance Services Division.

DECISION:

The unemployment insurance decision dated March 4, 2009, reference 01, is reversed. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The question of the repayment of benefits already received is remanded to the Unemployment Insurance Services Division.

Dan Anderson
Administrative Law Judge

Decision Dated and Mailed

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