

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TIMOTHY L PETTUS

Claimant

APPEAL NO. 12A-UI-02912-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA

Employer

OC: 02/05/12

Claimant: Respondent (1)

Section 96.5-2-a – Discharge
871 IAC 24.32(8) – Current Act of Misconduct

STATEMENT OF THE CASE:

Wells Fargo Bank NA filed a timely appeal from a representative's decision dated March 15, 2012, reference 01, which held claimant eligible to receive unemployment insurance benefits finding the claimant's dismissal was not for a current act of misconduct. After due notice, a telephone hearing was held on April 18, 2012. Claimant participated. The employer participated by Ms. Judy Berry, Hearing Representative; and witness, Mr. Brian Stevenson, Loan Administration Manager III. Employer's Exhibits A, B, and C and Claimant's Exhibits One and Two were received into evidence.

ISSUE:

The issue is whether the claimant was discharged for a current act of misconduct.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Timothy Pettus was employed by Wells Fargo Bank NA from December 6, 2010 until February 7, 2012 when he was discharged from employment. Mr. Pettus worked as a home preservation specialist and was paid by the hour.

The claimant was discharged based upon the employer's belief that Mr. Pettus had intentionally violated bank policy by incorrectly reporting his working hours on some occasions. Mr. Pettus had been verbally counseled by his immediate supervisor about punctuality. Employer's records reflect the claimant received a written warning about misreporting his working time. The employer's belief is the warning was issued to Mr. Pettus on August 15, 2011.

On December 20, 2011, the employer again had concerns that Mr. Pettus was inaccurately reporting some of his working time and the company began an investigation. The company's review of time card entries by Mr. Pettus was completed on January 13, 2012 while the claimant was not contacted until February 7, 2012 at which time the claimant was discharged.

The claimant denies intentionally misreporting his working time and attributes any errors to a brain injury that the claimant sustained shortly before beginning employment with the company. Claimant had provided medical documentation to the company confirming his difficulty with some cognitive issues because of his brain injury.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes a current act of misconduct sufficient to warrant the denial of unemployment insurance benefits. 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.

871 IAC 24.32(8) provides:

(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.

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). The issue is not whether the

whether the employer made a correct decision in separating the claimant but whether the claimant is entitled to unemployment insurance benefits. Infante v. Iowa Department of Job Service, 364 N.W.2d 262 (Iowa App. 1984). Misconduct serious enough to warrant discharge may not necessarily be serious enough to warrant the denial of job insurance benefits. Since misconduct must be “substantial” and based upon carelessness, the carelessness must actually indicate a “wrongful intent” to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Poor performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa 1988).

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 upon such past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

In the case at hand, Mr. Pettus gave advance notice to his employer that he had sustained a brain injury before beginning employment with the company. The employer was aware that certain cognitive functions of Mr. Pettus’ thinking process had been reduced due to the injury. Subsequently, the employer on occasion discovered discrepancies in Mr. Pettus’ time reporting. Some discrepancies were in favor of Mr. Pettus and some were in favor of the company. Wells Fargo Bank issued Mr. Pettus a written warning on August 15, 2011 and was reasonable in its belief that Mr. Pettus had signed the warning and was aware of it.

The claimant was discharged on February 7, 2012 based upon some instances of improper time reporting that occurred between December 20, 2011 and January 13, 2012. Although the employer had determined that Mr. Pettus had again violated company policy by incorrectly making time entries, the employer took no action to discharge the claimant between January 13, 2012 and February 7, 2012. The administrative law judge concludes that the conference call placed by the employer on February 7, 2012 was placed with the intention of discharging the claimant and not to further investigate the matter.

The administrative law judge concludes that the evidence in the record does not establish intentional, disqualifying misconduct on the part of the claimant that occurred during the approximate four weeks period between the time the investigation was completed and Mr. Pettus was discharged. Claimant, therefore, was not discharged for a current act of misconduct. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

DECISION:

The representative's decision dated March 15, 2012, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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