

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TRACIE K LISK
Claimant

APPEAL NO. 16A-UI-02848-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA
Employer

OC: 01/3/16
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Tracie Lisk filed a timely appeal from the February 26, 2016 (reference 02) decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that Ms. Lisk had been discharged on January 27, 2016 for failure to perform satisfactory work despite being capable of performing satisfactory work. After due notice was issued, a hearing was held on March 23, 2016. Ms. Lisk participated. The employer submitted written notice that the employer waived its participation in the appeal hearing. The hearing in this matter was consolidated with the hearing in Appeal Number 16A-UI-02849-JTT. The administrative law judge took official notice of the Agency's administrative record of benefits paid to the claimant and received Exhibit A into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Tracie Lisk was employed by Wells Fargo Bank North America as a full-time Research Remediation Analyst 1 from October 2014 until January 26, 2016; when the employer discharged her for alleged failure to meet performance quality metrics. The discharge occurred on Ms. Lisk's second day back from a medical leave of absence under the Family and Medical Leave Act. The leave had started on December 30, 2015 after Ms. Lisk sought medical evaluation and treatment for vertigo. Ms. Lisk learned that she was suffering from hypertension and was taken off work by a physician so that she could get her hypertension under control. During the leave, Ms. Lisk underwent additional medical evaluation that indicated she had a bad gallbladder and that she was suffering from a hereditary medical disorder.

Before Ms. Lisk went on leave, the employer had added a number of work processes. Ms. Lisk and the employer were both concerned with Ms. Lisk's error rate in performing her duties. Ms. Lisk did not realize how sick she had been until she started her medical leave and her ongoing illness was likely a factor in her error rate. Ms. Lisk also attributes a portion of her error

rate to being too thorough. If Ms. Lisk requested documentation that turned out not to be necessary for performing a particular task, the employer would include the request for the additional information an error to be included in the metrics measurement.

Before Ms. Lisk went on her FMLA leave, she had requested additional training to discern the source of her error rate. She had been working one-on-one with a trainer and was making progress in reducing her error rate.

At the time the employer met with Ms. Lisk on January 26, the employer told Ms. Lisk that because of her leave of absence it was not possible for her to remedy her error rate under the metrics measurement and that the employer was, therefore, discharging her from the employment. The employer advised Ms. Lisk that she was eligible to be rehired.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv., 275 N.W.2d 445, 448 (Iowa 1979).

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 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).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The employer waived participation in the appeal hearing and presented no evidence to support the allegation that Ms. Lisk was discharged for misconduct in connection with the employment. The evidence in the record fails to indicate any misconduct on the part of Ms. Lisk. The evidence indicates instead that Ms. Lisk performed her work duties in good faith and to the best of her ability but was unable due to illness and other factors to perform to the employer's satisfaction. Ms. Lisk was discharged for no disqualifying reason. Accordingly, she is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The February 26, 2016 (reference 02) decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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