**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**ROBERTO MARRAZZO**
Claimant

**WELLS FARGO BANK NA**
Employer

**APPEAL NO. 09A-UI-01726-JTT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 11/30/08 R: 02**
**Claimant: Respondent (1)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(8) – Current Act Requirement

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the January 26, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 24, 2009. Claimant Roberto Marrazzo participated. Scott Robinson, Fraud Supervisor, represented the employer. Exhibits One through Seven were received into evidence.

**ISSUE:**

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

Whether the discharge was based on a current act.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Roberto Marrazzo was employed by Wells Fargo Bank as a full-time Fraud Specialist II from December 20, 2007 until July 23, 2008, when Katy Van Horn, Fraud Manager, and Scott Robinson, Fraud Supervisor, discharged him from the employment. Mr. Robinson was Mr. Marrazzo's immediate supervisor. Mr. Marrazzo's duties involved answering incoming calls from customers about possible fraud issues, making outbound calls to customers concerning possible fraud issues, and taking action on customer accounts in connection with possible fraud issues. Mr. Marrazzo's work was conducted by telephone and by computer. The employer's automated telephone system would cue incoming and outgoing calls for Mr. Marrazzo to handle. Mr. Marrazzo's compensation was based, at least in part, on the number of calls he handled per hour.

On or before June 9, 2008, Mr. Robinson noted that Mr. Marrazzo's production numbers appeared to be inflated. Mr. Robinson met with Mr. Marrazzo on June 9 to discuss the concern and to make certain Mr. Marrazzo was aware of the correct method of coding his work actions and work time during and between calls. On or about June 17, the employer printed off a report that contained production information concerning Mr. Marrazzo's work conduct on

June 9, 11, 13, 14 and 16. The employer believed that the documentation demonstrated that Mr. Marrazzo had manipulated his production statistics on those days in order to obtain greater pay that he would not otherwise have received. The employer took no immediate action to follow up on its concern. Instead, the employer decided to defer further action until the monthly production statistics for June 2008 became available on July 1 or 2, 2008. That documentation reinforced the employer's concern that Mr. Marrazzo was purposely manipulating his production statistics. When the employer received and reviewed the June 2008 production statistics on July 1 or 2, the employer took no immediate action on that documentation. Instead, Mr. Robinson met with Mr. Marrazzo for a regular one-on-one review of his production, gave Mr. Marrazzo a positive review, and did not mention the employer's concern that Mr. Marrazzo was purposely manipulating his production statistics.

On July 8, 2008, the employer printed out records concerning each call or matter Mr. Marrazzo had handled on June 14, 2008, one of the dates of concern and one of the dates included in the report the employer printed out and reviewed on or about June 17, 2008. Between July 8 and July 23, the employer reviewed approximately 51 of the 194 transactions Mr. Marrazzo had handled on June 14. The employer compared the record of actions Mr. Marrazzo took on the accounts with the production report the employer had printed on June 17. On July 10, the employer remotely viewed and recorded information from Mr. Marrazzo's assigned computer as Mr. Marrazzo performed his work duties.

On July 23, the employer decided to discharge Mr. Marrazzo based on the information contained in the production report the employer had printed on June 17 and the record concerning June 14 that the employer had printed off on July 8. The decision to discharge Mr. Marrazzo was made before the employer met with Mr. Marrazzo on July 23 with the purpose of discharging him from the employment. At the time the employer met with Mr. Marrazzo for the purpose of discharging him from the employment, the employer notified Mr. Marrazzo for the first time that the conduct from June 9-16 subjected Mr. Marrazzo to possible or actual discharge from the employment.

**REASONING AND CONCLUSIONS OF LAW:**

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 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 administrative law judge notes that Mr. Robinson was often at a loss when asked to explain the actions Ms. Van Horn took to investigate the alleged misconduct. The employer had the ability to present testimony from Ms. Van Horn, but failed to present such testimony.

The evidence in the record fails to establish a "current act." See 871 IAC 24.32(8). The weight of the evidence indicates that the employer believed on June 9 that Mr. Marrazzo was engaged in misconduct. The evidence indicates that on June 17 the employer printed a production report that confirmed its belief that Mr. Marrazzo was engaged in misconduct. The evidence indicates that the employer had access at that time to all of the records and reports necessary to determine whether there was misconduct on the dates in question, but that the employer delayed further action without just cause to do so. The evidence indicates that on July 1 or 2, the employer had a monthly production report that again confirmed its belief that Mr. Marrazzo was engaged in misconduct on the dates in question. The employer again delayed further action on the matter without good cause. The evidence indicates that the employer unreasonably waited from June 14 to July 8 to print out detailed records of the transactions Mr. Marrazzo had handled on June 14. The evidence indicates that these records had been available to the employer on or about June 14 or 15. The evidence indicates that the employer took an unreasonable amount of time to review and compare records over the 15-day period of July 8 through July 23. The evidence indicates that on July 10, the employer directly viewed

transactions as Mr. Marrazzo handled them and that this review again confirmed the employer's belief that Mr. Marrazzo was engaged in misconduct.

The evidence indicates that the employer's delay at multiple points was unreasonable. The employer's delay from the time it believed in mid-June that there was misconduct to the time it notified Mr. Marrazzo on July 23 that the conduct placed his employment in jeopardy was unreasonable. The unreasonable delay caused all of the conduct in question to no longer constitute a current act. Because there was no current act, the administrative law judge need not further consider whether the conduct in question constituted misconduct. See 871 IAC 24.32(8).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Marrazzo was discharged for no disqualifying reason. Accordingly, Mr. Marrazzo is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Marrazzo.

**DECISION:**

The Agency representative's January 26, 2009, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw