

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KARLA F WYNJA
Claimant

APPEAL NO. 11A-UI-16257-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA
Employer

OC: 11/13/11
Claimant: Respondent (1-R)

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

STATEMENT OF THE CASE:

Employer Wells Fargo filed an appeal from the December 16, 2011 (reference 01) decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call on January 23, 2012. Because of proposed exhibit delivery issues the hearing was continued to February 10, 2012 and concluded on March 2, 2012. Claimant Karla Wynja participated. Wells Fargo participated through loan administration manager Landon Shanks and investigator Tracie Strom and was represented by Pamela Bailey of Barnett Associates Inc on January 23, 2012. Loring Lincoln of Barnett Associates represented Wells Fargo on the last two hearing dates. The other participants remained the same. Employer's Exhibit 1 (parts a, fax pages 4 – 9; b, fax pages 10 – 19; c, fax pages 20 – 21; d, fax pages 22 – 25; e, fax pages 26 – 34; and f, fax pages 35 – 36) was admitted to the record. Claimant did not receive Employer's Exhibit 1f and some parts of documents were redacted because of purported loan customer privacy issues, however, the documents provided to the ALJ were not redacted as to loan customer identity.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Wynja was employed full time as a loan document specialist from November 18, 2010 and was separated from employment on November 7, 2011. The first notice of the investigation that resulted in her discharge came on November 3, 2011 during her interview. On October 4 Shanks' subordinate Kendra Neer reviewed the Krause loan file and became aware of possible loan documentation irregularities (changes to loan insurance certificates) that prompted an investigation beginning October 13 when ten files were forwarded to the fraud risk management team and Strom. Of the ten files, the homeowner's and flood insurance certificates in four files resulted in the decision to discharge. Wells Fargo's loans are sold through a secondary market. When inaccurate information is entered in the loan package, buyers can hold Wells Fargo liable in the event of future payment problems to the extent of requiring Wells Fargo to repurchase the loan.

The Krause internal refinance loan triggered the investigation. (Employer's Exhibit 1c) Information was entered on August 3, 2011. Neer reportedly noticed that the same documents were downloaded several times with different information on each download about 15 seconds apart which was a flag. Wells Fargo did not present a record of these downloads. The mortgage loan number and exact name of the Wells Fargo loss payee legal name/mortgagee were to have been changed to reflect the new loan. The document that Wells Fargo claimed as having come in from the insured that still had the old information on it was not presented. It offered only the original loan information and the updated information that purportedly came from what Wynja had imported. Strom and Shanks alleged that Wynja made these changes by making a text box to remove information and place other information in its location. Documents are submitted in pdf format. Wynja did not know how to delete or change information but only knew how to add information or notes by placing text boxes in the document. She did not change the loan number or mortgagee. She had up to 100 contacts by phone per day and processed many documents for a single or multiple loan files at once. She imported all submitted documents related to loan files, whether correct or incorrect on the face.

The McCullough loan condo homeowner's insurance certificate was at issue on October 13, 2011. (Employer's Exhibit 1b) The original coverage period was from December 2010 through December 2011 and another document was downloaded with a coverage period from December 2011 through December 2012. Wells Fargo's concern with inaccurate insurance information was that if a policy was not properly renewed it could leave the collateral property uninsured. While Strom claims that during the interview with Wynja she admitted she made electronic text boxes to update the statement to show different information, there is no such admission in the Voluntary Statement. (See, Employer's Exhibit 1f) Wells Fargo pulled these documents from a sub-file of deleted documents because the loan closed quickly enough that it was not needed. She was not aware of how to change 2011 to 2012.

On October 10, 2011 Wynja added a text box to the Bundy loan insurance certificate to record that the shed on the property was valued at \$575.00 so did not need to be insured since the value was less than \$1,000.00. A notation was also made that the insurance bill was paid. (Employer's Exhibit 1d, fax pages 22, 23) She believes the homeowner provided that information but is uncertain because the note did not indicate and Wells Fargo did not provide e-mails or j-notes for that file. The insurance agent wrote on October 17, 2011 that the shed was valued at less than \$800.00 and the insurance bill notes that the mortgagee pays the premium. (Employer's Exhibit 1d, fax pages 24, 25) Shanks noted in rebuttal that he reviewed j-notes before the files were sent for investigation and found no j-notes on the changes.

The Calix loan flood dwelling policy declaration indicates the premium was paid in full. Wells Fargo did not provide a comparison document indicating any claimed change by Wynja. Nor did it provide a document with an additional line about a shed on the property. (Employer's Exhibit 1e)

Shanks testified Wynja was not interviewed during the investigation but Wynja noted "today's meeting" with Strom in her "voluntary statement" of November 3, 2011 and referred multiple times to having become aware of or being corrected about her loan documentation procedures. (Employer's Exhibit 1f) Wynja had not been warned her job was in jeopardy for any reason and had notes from underwriters that her documentation was good and clear but the only issue she was aware of was that she was not as fast as other loan document specialists. Adding information to insurance documents that did not exist in the original documents is considered a violation of Wells Fargo's ethics and code of conduct policy (Employer's Exhibit 1a, fax pages 7 and 8) but Shanks did say that information could be added via text boxes and that Wynja was trained to do so using "elmage" and the writing tool. (Employer's Exhibit 1a, fax page 5,

paragraph 3, bullet point 2) Wynja had access to a written guide about how to properly document homeowner's insurance. (Employer's Exhibit 1a, fax pages 4 - 7)

Strom noted that in the interview Wynja said she thought she had contacted the insurers and obtained accurate information. (Employer's Exhibit 1f) Strom did not do follow up interviews to verify or disprove this information but later said she did contact agencies and they claimed not to have the information Wynja said she provided them. Strom did speak with other team members about Wynja's claim that they told her in training to move text boxes but found that they did not use that practice. The other team members did not participate in the hearing. She was trained to add a text box for a note in an empty spot rather than replace information. Text boxes are to be used to document information or a conversation about a particular loan file document and the source of the information. The box is to be placed in a blank space at the top or bottom of the page. Shanks did tell Wynja in the fall of 2011 not to put information in a large format on documents.

Claimant was out of the country on a mission trip from January 25 through February 7, 2012 and claimed benefits for the two weeks ending February 4, 2011. The availability for work issue covering that period has not yet been determined at the Claims level.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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.

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 employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman, Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. IDJS*, 391 N.W.2d 731 (Iowa App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988). A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." *Greene v. EAB*, 426 N.W.2d 659 (Iowa 1988).

Wells Fargo's evidence is suspect foundationally since there is missing information about allegations that claimant entered multiple documents in a short period of time that flagged the inquiry. There is also credibility concern about the discrepancies between Shanks' and Strom's testimony and Strom's internal inconsistencies noted in the findings of fact. Certainly, since the documents provided to Wynja were different, missing, or redacted, the reliability of those documents is also in question. As a result, where the parties' evidence conflicts regarding documentation, Wynja's testimony is considered credible. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the incident under its policy. Even had Wells Fargo established misconduct, since it had not previously warned claimant about the process issues leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Furthermore, inasmuch as Wells Fargo knew of the documentation issues as early as October 4 and referred the issues for an investigation but the claimant was not interviewed or notified of the investigation until four days before she was fired more than three weeks later, the acts for which the claimant was discharged were no longer current. Since a claimant may not be disqualified for past acts of misconduct, and employer has

not established that her conduct was deliberate or that she had been alerted to the error of her procedures, benefits are allowed.

DECISION:

The December 16, 2012 (reference 01) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

REMAND: The availability for work issue delineated in the findings of fact is remanded to the Claims Section of Iowa Workforce Development for an initial investigation and determination.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/css