

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

GARY F BAILEY
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SIOUX CITY IA 51108

WELLS FARGO BANK
C/o TALX EMPLOYER SERVICES
PO BOX 1160
COLUMBUS OH 43216-1160

Appeal Number: 05O-UI-05952-RT
OC: 02/13/05 R: 01
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The claimant, Gary F. Bailey, filed a timely appeal from an unemployment insurance decision dated March 14, 2005, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on July 1, 2005, with the claimant participating. Another witness was available to testify for the claimant but not called because his testimony would have been repetitive and unnecessary. Dale Luthy, Senior Vice President and Regional Manager, participated in the hearing for the employer, Wells Fargo Bank. Employer's Exhibit One was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

An initial hearing was held in this matter on April 8, 2005, with both parties participating. By a decision dated April 15, 2005, the administrative law judge who heard that case allowed benefits to the claimant. The employer appealed to the Employment Appeal Board. By a decision dated June 1, 2005, the Employment Appeal Board remanded this matter for another hearing because the tape of the first hearing could not be reviewed. A second hearing was scheduled for June 21, 2005, at 9:00 a.m. and rescheduled at the employer's request.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibit One, the administrative law judge finds: The claimant was employed by the employer as a full-time private banker from February 3, 2003, until he was discharged on December 20, 2004. The claimant was discharged for an alleged breach of the employer's code of ethics, including making a personal loan of personal funds to a customer when the customer was not a family member and for conflict of interest violations. The employer's rules and policies appear at Employer's Exhibit One. Towards the latter part of July, the claimant was discussing with a lifelong friend, Mr. H, about taking out a home equity line of credit with the employer. The claimant and Mr. H had grown up together and were close friends. Prior to applying for the home equity line of credit, Mr. H needed a loan right away to avoid liquidating soybeans and corn that he had on hand. This was a spur of the moment requirement. The claimant loaned Mr. H \$10,000.00 of his personal funds on July 30 or 31, 2004. At that time, Mr. H had no account with the employer, nor was there any business relationship with the employer. The spouse of Mr. H also did not have an account with the employer.

On August 3, 2004, Mr. H applied for a home equity line of credit with the employer and pursued the loan and obtained the line of credit on August 6, 2004. The line of credit was in excess of \$100,000.00. The reason for this line of credit was different, and was separate, from the personal loan made by the claimant earlier.

The personal loan came to the attention of the employer's witness, Dale Luthy, Senior Vice President and Regional Manager, on December 9, 2004, as a result of a compliance investigation. Mr. Luthy then consulted others and completed an investigation and discharged the claimant on December 20, 2004, for making this personal loan. The claimant received a copy of the employer's code of ethics and business conduct, as shown at Employer's Exhibit One, and signed an acknowledgment therefore, also as shown at Employer's Exhibit One. The claimant was, in general, familiar with the code of ethics and business conduct.

Pursuant to his claim for unemployment insurance benefits filed effective February 13, 2005, the claimant has received unemployment insurance benefits in the amount of \$4,340.00 as follows: \$310.00 per week for 14 weeks from benefit week ending February 19, 2005, to benefit week ending May 21, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. He is 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The parties agree, and the administrative law judge concludes, that the claimant was discharged on December 20, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct.

The actual facts of this matter are really not in dispute. The claimant was discharged for making a personal loan of his personal funds to a close, personal, and long-time friend on July 30 or 31, 2004. At the time, the friend, Mr. H, had no account with the employer, nor did his spouse, and Mr. H had no business relationship with the employer. The employer has a code of ethics and business conduct, a copy of which the claimant received and for which he signed an acknowledgment and of which he was generally familiar, prohibiting the lending of personal funds to customers of the employer and prohibiting certain conflicts of interest, as

shown at Employer's Exhibit One. The administrative law judge concludes that at the time of the personal loan made by the claimant to Mr. H on July 30 or 31, 2005, that Mr. H was not a customer of the employer. The administrative law judge was unable to find any Iowa case directly in point. However, the Iowa Supreme Court, in two cases, appears to define "customer" or "customers" rather strictly in other contexts. See Equal Access Corporation v. Utilities Board, 510 NW 2d 147 (Iowa 1993) and Low v. Ford Hopkins Company, 1 NW 2d 95, 231, Iowa 251 (Iowa 1941). It may be that at the time of the personal loan Mr. H was a potential or prospective customer of the employer, but that is not addressed by the employer's rule. It is true that at the time of the personal loan the claimant and Mr. H had discussed a home equity line of credit with the employer for a significantly larger sum and in fact Mr. H applied for such a line of credit on August 3, 2004, and obtained the funding of the line of credit on August 6, 2004. The evidence establishes that this line of credit was different from, and unrelated to, and occurred after, the personal loan made by the claimant. Accordingly, the administrative law judge concludes that the claimant did not specifically violate any provisions of the employer's code of ethics and business conduct. The claimant made the personal loan on the spur of the moment to help a lifelong friend who needed some cash immediately and did not want to liquidate any soybeans or corn. The claimant, under those circumstances, made the loan. Accordingly, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant's loan was either a deliberate act constituting a material breach of his duties or that it evinced a willful or wanton disregard of the employer's interests and is therefore not disqualifying misconduct for those reasons. However, the administrative law judge must conclude that the claimant's loan was unwise in retrospect. The issue then becomes whether the claimant's loan of personal funds was negligent and, if so, whether it was carelessness or negligence in such a degree recurrence as to establish disqualifying misconduct.

The administrative law judge is constrained to conclude that the claimant's personal loan was an act of negligence. The claimant's duties as a private banker included making loans. He was working for an employer, a bank, that has as one of its primary functions the lending of money to customers. Mr. H was at least a potential or prospective customer and, in fact, became a customer of the employer. Accordingly, the administrative law judge concludes that the claimant's personal loan was an act of negligence. However, the claimant had received no relevant warnings or disciplines for such behavior. Under these circumstances, the administrative law judge concludes that the claimant's personal loan was not carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct, but is ordinary negligence in an isolated instance or perhaps a good faith error in judgment or discretion and is not disqualifying misconduct.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged, but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

The administrative law judge believes that he should address past conduct. The personal loan giving rise to the claimant's discharge occurred on July 30 or 31, 2004, but the claimant was not discharged until December 20, 2004. The administrative law judge concludes that the claimant's discharge was not for past conduct, because the employer's witness, Dale Luthy, Senior Vice President and Regional Manager, did not learn of the personal loan by the claimant until December 9, 2004, as a result of a compliance investigation. Mr. Luthy then took prompt action by consulting others and conducting an investigation. Accordingly, the administrative law judge concludes that the claimant's discharge was not for past misconduct. See 871 IAC 24.32(8).

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$4,340.00 since separating from the employer herein on or about December 20, 2004, and filing for such benefits effective February 13, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of March 14, 2005, reference 01, is reversed. The claimant, Gary F. Bailey, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out his separation from the employer herein.

kjw/kjw