

BEFORE THE  
EMPLOYMENT APPEAL BOARD  
Lucas State Office Building  
Fourth floor  
Des Moines, Iowa 50319

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HEATHER R VARVEL

Claimant,

and

WELLS FARGO BANK NA

Employer.

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HEARING NUMBER: 08B-UI-07417

EMPLOYMENT APPEAL BOARD  
DECISION

**NOTICE**

**THIS DECISION BECOMES FINAL** unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

**SECTION: 96.5-2-a**

**DECISION**

**UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE**

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

**FINDINGS OF FACT:**

The claimant, Heather R. Varvel, worked for Wells Fargo Bank, NA from October 15, 2007 through July 15, 2008 as a part-time customer service representative. (Tr. 2-3, 9-10) The employer has a policy (code of ethics) (Tr. 8) regarding depositing worthless items in order to clear outstanding items. (Tr. 3) A violation of this code could warrant immediate termination. (Tr. 8) Between May 15<sup>th</sup> and May 21<sup>st</sup>, 2008, Ms. Varvel deposited four separate deposits from her Bank of the West account into the Wells Fargo account, which was overdrawn. (Tr. 3-4) The claimant learned that her Bank of the West account would be overdrawn if her four transactions went through; so as advised by the latter, she put a stop payment order on the transactions, which resulted in her Wells Fargo account being overdrawn. (Tr. 4, 6, 12-13) In an attempt to rectify the situation, she tried to close the Wells Fargo account

because of the excessive overdraft fees she was accumulating, which lasted over a two-month period.  
(Tr. 15-16)

On June 17<sup>th</sup>, 2008, the employer's internal fraud discovery unit learned that Ms. Varvel's account had been overdrawn for over a month. (Tr. 5) The employer contacted line management and an employee relations consultant to schedule a meeting with Ms. Varvel regarding this matter. The meeting kept getting postponed "because of either illness or scheduling conflicts..." (Tr. 6, 17) The employer did not meet with the claimant until July 14<sup>th</sup>, 2008 (Tr. 6) whereupon they questioned her about the transactions. (Tr. 12)

The employer placed Ms. Varvel on administrative leave pending further investigation. (Tr. 6) The following day, the employer terminated Ms. Varvel.

## REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2007) provides:

*Discharge for Misconduct.* If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to

misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

The record clearly establishes that Ms. Varvel violated the employer's policy regarding clearing outstanding items with worthless deposits sometime during the middle of May of 2008. The claimant testified that she tried to rectify the problem, but to no avail. Once the employer learned of the problem on June 17, 2008 (nearly one month later), the employer initiated an investigation which took another month (July 14<sup>th</sup>) before taking action, i.e., placing the claimant on administration leave. There is no evidence in this record to establish that the claimant had any knowledge of this investigation, nor that she was put on notice that her job was in jeopardy pending the same. The claimant had no prior warnings, and did not believe her mistake would result in her termination.

The first time Ms. Varvel learned of the employer's concern with her account was on July 14<sup>th</sup> when the employer questioned her about the long-standing overdraft charges. (Tr. 11) The employer's decision to terminate her for such a violation the following day (nearly two months after the event) takes away the currentness of the final act.

The court in Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988) held that in order to determine whether conduct prompting the discharge constituted a "current act," the date on which the conduct came to the employer's attention and the date on which the employer notified the claimant that said conduct subjected the claimant to possible termination must be considered to determine if the termination is disqualifying. Any delay in timing from the final act to the actual termination must have a reasonable basis. The employer offered no reasonable explanation as to why it took so long to terminate the claimant for this policy violation. (Tr. 5-6) for this reason, we conclude that the employer failed to satisfy their burden of proof in establishing a current act.

#### DECISION:

The administrative law judge's decision dated September 9, 2008 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

AMG/fnv

**DISSENTING OPINION OF MONIQUE F. KUESTER:**

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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Monique F. Kuester

AMG/fnv