

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LANA L GRAY
Claimant

APPEAL NO. 09A-UI-16429-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA
Employer

OC: 09/13/09
Claimant: Respondent (1)

Section 96.5-2-A -- Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated October 21, 2009, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on December 8, 2009. Claimant participated. The claimant was represented by Bruce Stoltze, Attorney at Law. Employer participated by Jay Ginsberg, Lending Manager, and Jeanine Bittenbaugh, Lending Operations Manager. The record consists of the testimony of Jeanine Bittenbaugh; the testimony of Jay Ginsberg; the testimony of Lana Gray; and Employer's Exhibits 1-10.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer provides home mortgages and the claimant was an underwriter 3. She was responsible for reviewing applications for home mortgages to determine if the loan could be made. The claimant had worked as an employee of Wells Fargo since January 4, 2008. Prior to that date, she was a contract employee and had also been employed by Norwest, which was acquired by Wells Fargo.

The incident that led to the claimant's termination occurred on August 17, 2009. The claimant's timecard for that day showed that she had worked for eight hours that day. When this timecard was matched against what is called a card access event report, there was a discrepancy. The card access event report is made up of entries that come from the claimant using her badge to enter and leave the building. The employer also looked at timecards in July 2009 and determined that the claimant had not reported her lunch time. Yet another report showed the claimant working on Saturday and Sunday, but no time was reported.

The employer was trying to eliminate payment of overtime and still get the work accomplished. The claimant's previous supervisor felt that the claimant was making too many "conditions" on her loans and wanted her to stream line her procedures. The claimant then got a memo saying that all her conditions had to be cleared in forty-eight hours. The claimant knew she had some dental appointments coming up and so, in an effort to get her work done and go to her dental appointments, she did work over the weekend. She did not get paid for hours she did not work, but her time was spread over several days. She reported her time as she felt she had been instructed to do by her previous manager.

Although the August 17, 2009, timecard was reviewed at that time and the card access report was generated on August 24, 2009, the claimant was not terminated until September 18, 2009. She was allowed to work from August 17, 2009, until her termination.

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer or in repeated acts or carelessness or negligence. Misconduct excludes good faith errors of judgment or discretion. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871

IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof on misconduct.

In this case, the employer has failed to show a current act of misconduct. A month elapsed between the time the employer questioned the claimant's time for August 17, 2009, and her termination on September 18, 2009. The employer tried to justify this delay by saying that it "took time" to get the reports. However, the card access report was generated on August 24, 2009. There is no evidence of misconduct after that card access report was generated and the claimant was allowed to keep working. The employer did not, therefore, terminate the claimant for a current act of misconduct. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated October 21, 2009, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css