

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KRISTINA A NICOLINO

Claimant

APPEAL NO. 07A-UI-04612-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA

Employer

**OC: 04/08/07 R: 02
Claimant: Respondent (2R)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

Wells Fargo Bank filed a timely appeal from the April 27, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 22, 2007. Claimant Kristina Nicolino participated. Banking Supervisor Tina Godwin represented the employer. The administrative law judge took official notice of the Agency's record of benefits paid to the claimant and received Exhibits One through Seven into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment, based on excessive unexcused absences, that disqualifies her for unemployment insurance benefits.

Whether the claimant has been overpaid benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kristina Nicolino was employed by Wells Fargo Bank on a full-time basis from June 12, 2000 until April 12, 2007, when Banking Supervisor Tina Godwin discharged her for repeated tardiness following warnings for tardiness. Ms. Nicolino had transferred to the Banking Department on November 9, 2006 and was a Banking Specialist 1. Ms. Godwin was Ms. Nicolino's immediate supervisor in the Banking Department. Ms. Nicolino's regular scheduled hours in the Banking Department were 8:00 a.m. to 4:30 p.m. Mondays, Wednesdays and Fridays, and 9:25 a.m. to 5:55 p.m. on Tuesdays.

The final incident that prompted the discharge occurred on April 12, 2007. On that day, Ms. Nicolino arrived at the workplace 10 minutes prior to the scheduled start of her shift. Ms. Nicolino expected to eat breakfast prior to commencing work and had left food in the employer's refrigerator for that purpose. The food Ms. Nicolino had left in the employer's refrigerator was missing from the refrigerator when Ms. Nicolino went to the refrigerator to collect it. Ms. Nicolino was pregnant, but had experienced no complications with the pregnancy. Ms. Nicolino left the workplace and traveled to a McDonald's restaurant located approximately

one mile from the employer. Banking Supervisor Tina Godwin was in her office at the time Ms. Nicolino arrived and departed for McDonald's. Ms. Godwin's office is located close to the employer's cafeteria, where the refrigerator is located. Ms. Nicolino did not consult with Ms. Godwin before she left the workplace to go to McDonald's. Ms. Nicolino did not return to the workplace until six minutes after the scheduled start of her shift. The employer deemed Ms. Nicolino tardy for her shift. The employer's attendance policy required Ms. Nicolino to be at her workstation at the scheduled start of her shift. This policy had recently been reviewed with Ms. Nicolino after a March absence.

The employer has a written attendance policy set forth in an employee handbook, a copy of which had been provided to Ms. Nicolino. The policy required Mr. Nicolino to be at her workstation at the scheduled start of her shift and to notify the employer if she needed to be late.

Ms. Nicolino's prior absences were as follows. On January 9, Ms. Nicolino was absent two hours to contest a speeding ticket. On January 15, Ms. Nicolino left one hour early with approval, due to inclement weather. The employer had authorized all of the employees in the Department to leave early that day. On January 18, Ms. Nicolino was tardy due to childcare issues. On February 13, Ms. Nicolino was tardy due to personal transportation issues. On March 13 and March 15, Ms. Nicolino was tardy for personal reasons. On March 20, Ms. Nicolino was tardy due to personal transportation issues.

On January 27, 2007, Ms. Godwin counseled Ms. Nicolino regarding her absence from the workplace on January 9, 15, and 18 and warned Ms. Nicolino not to have any additional attendance issues prior to April 23, 2007. Ms. Godwin reprimanded Ms. Nicolino after this incident of tardiness and warned her not to have any additional tardiness during the 90-day period that would end on June 17, 2007.

Ms. Nicolino established a claim for benefits that was effective April 8, 2007 and has received benefits.

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.

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 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).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The greater weight of the evidence in the record establishes that the final absence on April 12, 2007 was an unexcused absence under the applicable law. The fact that Ms. Nicolino was

pregnant did not excuse her from notifying the employer if she needed to be late for work. Though Ms. Nicolino had stopped into the workplace prior to the start of her shift, the evidence indicates that Ms. Nicolino subsequently departed the workplace and was in fact tardy for her shift. The greater weight of the evidence establishes unexcused absences on January 9, and 18, February 13, and March 13, 15, and 20. The evidence indicates that instances of tardiness occurred in the context of repeated reprimands. The evidence in the record establishes excessive unexcused absences.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Nicolino was discharged for misconduct. Accordingly, Ms. Nicolino is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Nicolino.

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.

Because Ms. Nicolino has received benefits for which she has been deemed ineligible, those benefits constitute an overpayment that Ms. Nicolino must repay to Iowa Workforce Development. Ms. Nicolino is overpaid \$2,429.00.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The testimony presented at the hearing concerning Ms. Nicolino's pregnancy raised the question of whether Ms. Nicolino has been both able to work and available for work since establishing her claim for benefits. The issue was not before the administrative law judge. This matter will be remanded so that a claims representative so that the issue may be addressed.

DECISION:

The claims representative's April 27, 2007, reference 01, decision is reversed. Ms. Nicolino was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged. Ms. Nicolino is overpaid \$2,429.00.

REMAND:

This matter will be remanded to a claims representative so that the issue may be addressed.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs