

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

MELISSA D PACHECO  
3120 COTTAGE GROVE APT 1  
DES MOINES IA 50311

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

Appeal Number: 06A-UI-04840-JTT  
OC: 04/9/06 R: 02  
Claimant: Respondent (1)

**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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5(1) – Voluntary Quit  
871 IAC 24.26(21) – Quit in Lieu of Discharge

STATEMENT OF THE CASE:

Wells Fargo Bank filed a timely appeal from the April 28, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 22, 2006. Claimant Melissa Pacheco participated. Supervisor Stacey Bryan represented the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Melissa Pacheco was employed by Wells Fargo Bank as a full-time customer service representative from July 5, 2005 until January 20, 2006, when she quit. Ms. Pacheco's immediate supervisor was Brenda Woods. On January 9, Ms. Pacheco was admitted to the hospital because she was throwing up blood. Ms. Pacheco was discharged from the hospital on January 13. The

employer's log of telephone calls indicates that Ms. Pacheco properly notified the employer in connection with her absences on January 9, 10, 12, and 13. During her second day in the hospital, Ms. Pacheco spoke directly with Ms. Woods. At that time, Ms. Woods told Ms. Pacheco that, pursuant to the employer's attendance policy, Ms. Pacheco would have to apply for and be approved for short-term disability benefits in order to continue in the employment. At the same time, Ms. Woods told Ms. Pacheco that she would not qualify for short-term disability benefits because she had not been in the employment long enough. Ms. Pacheco continued to maintain regular contact with Ms. Woods. In addition, Ms. Pacheco was in contact with the employer's human resources department as she applied for and was denied benefits under the employer's short-term disability program. On January 18, Ms. Pacheco attempted to return to work. Ms. Woods was not present when Ms. Pacheco attempted to return to work. Another supervisor told Ms. Pacheco that she could not return without a doctor's release. Ms. Pacheco went to her doctor the same day and requested a release. The doctor indicated he or she was not willing to grant a full release at the time. Ms. Pacheco contacted Ms. Woods with the information. Ms. Woods told Ms. Pacheco that she faced discharge under the employer's attendance policy and that it would look better for her to resign the employment. On January 20, Ms. Pacheco met with Ms. Woods and Ms. Woods provided Ms. Pacheco with instructions regarding what she should say in her resignation letter. Ms. Pacheco delivered the letter the same day. Prior to the absences that began on January 9, Ms. Pacheco's most recent absence had been on November 9, when she was absent because her daughter was ill and properly notified the employer. Prior to that date, Ms. Pacheco's most recent absence had been on July 18, when she was absent because her brother had been in an accident and properly notified the employer.

#### REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Pacheco's voluntary quit was for good cause attributable to the employer. It does.

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

871 IAC 24.26(21) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

- (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

In analyzing quits in lieu of discharge, the administrative law judge considers whether the evidence establishes misconduct that would disqualify the claimant for unemployment insurance benefits.

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).

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 Ms. Pacheco's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that her *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 employer presented no first-hand testimony from Ms. Woods or any other Wells Fargo employee who had contact with Ms. Pacheco at or before the time of her separation from the employment. The greater weight of the evidence in the record establishes that Ms. Pacheco's absences during the period of January 9-18 were for illness properly reported to the employer and are deemed excused absences under the applicable law. The evidence does not establish a current act of misconduct that would have disqualified Ms. Pacheco for unemployment insurance benefits. The greater weight of the evidence indicates that Ms. Pacheco resigned in lieu of imminent discharge and that Ms. Pacheco's quit was for good cause attributable to the employer. Accordingly, Ms. Pacheco is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Pacheco.

#### DECISION:

The Agency representative's decision dated April 28, 2006, reference 01, is affirmed. The claimant quit the employment for good cause attributable to the employer. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

jt/kkf