

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CONNIE CLARK
Claimant

APPEAL NO: 07A-UI-04532-B

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA
Employer

OC: 04/15/07 R: 02
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Connie Clark (claimant) appealed an unemployment insurance decision dated April 30, 2007, reference 01, which held that she was not eligible for unemployment insurance benefits because she was discharged from Wells Fargo Bank NA (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a hearing was held in Des Moines, Iowa on June 5, 2007. The claimant participated in the hearing with her husband David Clark. The employer participated through Brett Smith, District Manager. Employer's Exhibits One and Two were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the employer discharged the claimant for work-related misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired as a part-time teller on September 16, 1997 and became a service manager in July 2006. She was discharged on April 13, 2007 for violation of policy and unprofessional conduct. The employer received an anonymous letter mailed on March 31, 2007 which complained about the claimant. The letter reported the claimant was saying offensive comments and racial slurs against Hispanic people. The claimant was speaking to Qwest Communications in a personal call and was upset that the customer service representative had a heavy accent. The anonymous customer reported that a co-worker, Shelly Marsh, told the claimant to stop and calm down and the claimant said it "pisses" her off. The employer began an investigation in response to the complaint and interviewed two co-employees who confirmed the claimant made inappropriate comments. These two employees work opposite each other so both witnessed different incidents.

Ms. Marsh confirmed the incident regarding the claimant's comments about Hispanics but also reported the claimant made similar derogatory remarks about others. There was apparently a show on television with Ellen Degeneres and the claimant stated repeatedly, "She's a fag, turn

the channel.” When the employer questioned her about these comments, the claimant said, “Well, she is gay.” The other comment was made about a soap opera actress and the claimant again wanted the channel changed because she said the actress was a “slut.” The claimant could not recall making the comment but admitted the actress has a bad reputation. The other co-employee had not heard these specific comments but admitted she had heard the claimant make similar comments.

Based on the complaint, her co-workers’ statements and her own statements, the employer discharged the claimant. At the hearing, the claimant denied making these specific statements but admitted making other, similar comments. She admitted she was on a call to Qwest and was upset because she could not understand the representative but claimed no customers could have heard her comments. The claimant acknowledged making a comment that she would not watch Ellen Degeneres because she does not approve of her lifestyle but denies watching her on the television and calling her a fag at the workplace. She believes the complaint letter was written by a co-employee and believes she was terminated because her manager was jealous of her since she was doing a good job.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a.

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 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 N.W.2d 661, 665 (Iowa 2000).

The claimant was discharged for a lack of professionalism which was a violation of the employer's work rules. The employer's case consisted of hearsay evidence and part of that was from an anonymous source. The claimant denies any wrongdoing but her own testimony shows there is a kernel of truth in the allegations. However, when looking at the evidence on the whole, it is insufficient to establish misconduct by a preponderance of the evidence. Work-connected misconduct as defined by the unemployment insurance law has not been established in this case and benefits are allowed.

DECISION:

The unemployment insurance decision dated April 30, 2007, reference 01, is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs