

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

RENE DE LA ROSA
Claimant

APPEAL NO. 18A-UI-07380-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA
Employer

OC: 06/03/18
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Rene de la Rosa (claimant) appealed a representative's July 5, 2018, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with Wells Fargo Bank (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for July 26, 2018. The claimant participated personally. The employer did not provide a telephone number where it could be reached and therefore, did not participate in the hearing. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

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 on May 11, 2015, and at the end of his employment he was working as a full-time loan servicing specialist two. Prior to being hired by the employer, he worked for the employer for one year through a temporary agency. He received of the employer's handbook at his hire. The employer did not issue the claimant any written warnings during his employment.

Co-workers sent e-mails to each other that did not involve company business. The claimant was unaware of any prohibition on the use of company e-mail to discuss personal topics with co-workers. The claimant and his girlfriend, a co-worker, exchanged emails professing mutual admiration. The girlfriend gave the claimant her computer logon and password. The claimant did not reciprocate. The girlfriend used her work computer to access information not related to her job duties.

Later, the relationship deteriorated and the two sent each other e-mails on the employer's computer telling the other to stop or there would be a report to the human resources department. The girlfriend opened the mortgage screen on her work computer, made a false entry with the claimant's and claimant's wife names, and sent a screen shot of her work

computer to the claimant's cellphone. The girlfriend sent a comment along with the picture about not believing the claimant had a mortgage. The claimant and his wife were renting their living space and did not have a mortgage. The last email sent by the claimant was on May 25, 2018.

On or about May 31, 2018, the claimant's direct supervisor verbally told the claimant to stop sending personal emails. The claimant followed her instructions. On June 5, 2018, the employer talked to the claimant about the emails he sent. He told the employer he had not understood the employer's policy and asked for leniency in the matter. The claimant explained the co-worker's role in the situation. On June 5, 2018, the employer terminated the claimant for promising to report the girlfriend to human resources if she did not stop sending him emails. The girlfriend was not terminated.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident provided by the employer occurred on May 25, 2018. The employer told the claimant to stop and he did. No further infractions occurred. The claimant was not discharged until June 5, 2018, eleven days later. No reason was given for the delay.

The employer treated the claimant and the co-worker differently for promising to report the other to human resources if the emailing did not stop. No reason was given for the disparate treatment. It may be said that the claimant was not using good judgment at work. Lack of good judgment is not misconduct. On the other hand, his co-worker was using his personal information to threaten him with falsifying loan information in his name. He reasonably asked her to stop emailing him or he would report her to the employer. The employer has failed to provide any evidence of willful and deliberate misconduct which was the final incident leading to the discharge and disqualification may not be imposed.

DECISION:

The representative's July 5, 2018, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs