

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MCKENZIE D MCCRACKEN
Claimant

APPEAL NO. 11A-UI-10329-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA
Employer

OC: 06/26/11
Claimant: Respondent (1)

Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 28, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 25, 2011. Claimant McKenzie McCracken participated. Colleen Butler of Barnett Associates represented the employer and presented testimony through Nevin Dutta and Tammy Cook. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Eight into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: McKenzie McCracken was employed by Wells Fargo Bank as a part-time Loan Services Specialist from September 2010 until June 27, 2011, when Nevin Dutta, manager of loan administration in home mortgage, discharged her from the employment for failure to meet performance quality expectations. Mr. Dutta was Ms. McCracken's immediate supervisor. Ms. McCracken's duties involved working with home owners to bring their home loans current through modification of the loan amount or unpaid principal. This was phone-based work dealing with inbound calls routed to Ms. McCracken via an automated call load balancing system. Ms. McCracken would handle an average of 30 to 40 calls per shift, but could handle as many as 50 calls per shift. The employer monitored four calls per month for quality assurance purposes and graded the quality of the call through a point system. Employees were expected to maintain an 85 point average month by month.

The final conduct that triggered the discharge was Ms. McCracken's failure to meet the 85 point call quality standard during June 2011. Ms. McCracken's call quality for June averaged 78.5 under the employer's scoring system. The employer had scored a call during each week of June. Ms. McCracken's weekly scores for June were 86, 74, 73, and 81. The employer was not able to speak to the particular issues pertaining to each of the four calls scored in June, but notes that there were some recurring problems that manifested in the calls. Ms. McCracken might fail to ask for a payment if the customer had missed a payment. Ms. McCracken might fail to warn customers of the consequences of failing to submit required documentation in a timely manner. Ms. McCracken might

fail to go through the required security process of assuring she had the right person on the phone. The employer had provided supplemental training to Ms. McCracken to assist her with meeting the quality expectations. Ms. McCracken often did not meet the quality expectations in connection with the calls that were reviewed weekly or monthly. On the other hand, Mr. Dutta found Ms. McCracken most of the time to be intelligent, responsive, and respectful.

The employer considered other, past issues in making the decision to discharge Ms. McCracken. The employer considered attendance matters, but the last absence had been on May 16. The employer considered past problems with Ms. McCracken erroneously routing calls she did not know how to handle, but the last such incident dated from mid-April 2011.

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.

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).

The employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to establish a current act of misconduct. The employer was unable to testify to the particulars of the four calls in June that triggered the discharge. The employer had the ability to present such evidence, but was unprepared to do so at the hearing. Even better, the employer could have made the actual calls available for the hearing. The employer elected instead to speak in terms of common themes. The evidence indicates that Ms. McCracken did meet the 85 point requirement during the first week of June. The fact that she did not meet that requirement for other weeks in June lacks evidentiary weight in the absence of evidence regarding the specific problems with each of the three calls upon which those weekly scores were based. This is especially so, given the number of calls Ms. McCracken would handle during any particular shift. The employer's other concerns about call avoidance or attendance did not involve current conduct and need only be considered if the evidence had first established a "current act" of misconduct.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. McCracken was discharged for no disqualifying reason. Accordingly, Ms. McCracken is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. McCracken.

DECISION:

The Agency representative's July 28, 2011, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw