

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUDY A STIPE

Claimant

APPEAL NO: 12A-UI-10064-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA

Employer

OC: 07/15/12

Claimant: Respondent (1)

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences
871 IAC 24.32(8) – Current Act

STATEMENT OF THE CASE:

The employer appealed a department decision dated August 9, 2012, reference 01, that held the claimant was not discharged for misconduct on May 31, 2012, and which allowed benefits. A telephone hearing was held on September 12, 2012. The claimant participated. Leslie Ennis, customer service supervisor, and Frankie Patterson, representative, participated for the employer. Employer Exhibit 1 was received as evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with employment.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered the evidence in the record, finds: The claimant began employment on October 6, 2003, and last worked for the employer as a full-time CSR on April 9, 2012. She was granted FMLA due to personal/family issues. She was notified that the leave exhausted on May 7 and she needed to return to work by May 17. When she failed to return to work by that date, she was terminated.

Claimant called in to the employer on a regular basis to let it know she would not be into work. She called in absences for May 16, 17, and 18 stating she had an infected tooth and would not be at work for this reason. Unbeknownst to claimant, the employer had considered her to be a voluntary quit for failing to return to work by May 17. She was later informed of this employment separation.

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.

871 IAC 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.

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The administrative law judge concludes the employer has failed to establish that the claimant was discharged for misconduct in connection with employment on May 17, 2012.

Although claimant's FMLA expired as of May 17, she properly reported an unrelated health issue (infected tooth) as the reason for her absence period from May 16 through 18. The

employer did not consider this reason for absence, because she no longer had any personal leave to cover it. The claimant's properly reported personal health issue is for an excusable reason and it is not a current act of misconduct that led to employment termination on May 17.

DECISION:

The department decision dated July 15, 2012, reference 01, is affirmed. The claimant was not discharged for a current act of misconduct on May 17, 2012. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/kjw