

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DANIEL L STARKWEATHER
Claimant

APPEAL NO. 10A-UI-04789-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA
Employer

OC: 02/21/10
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from a representative's decision dated March 18, 2010, reference 01, which held claimant eligible to receive unemployment insurance benefits based upon his separation from Wells Fargo Bank NA. After due notice, a telephone hearing was held on May 11, 2010. The claimant participated personally. The employer participated by Eka Otu, Hearing Representative and witness, Markus Bailey, Manager. Employer's Exhibit One was received into evidence.

ISSUES:

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits and whether the claimant has been overpaid job insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record the administrative law judge finds: Daniel Starkweather was employed by Wells Fargo Bank NA from February 16, 2009 until February 25, 2010 when he was discharged from employment. Mr. Starkweather worked as a full-time operations clerk II and was paid by the hour. His immediate supervisor was Markus Bailey.

The claimant was discharged on February 25, 2010 for continuing to engage in horseplay and other non-business-related practices after being warned.

Mr. Starkweather had been warned on December 21, 2009 about engaging in non-work-related conduct/horseplay. The claimant at that time had built two large "pyramids" in a work area out of shipping boxes during a time in which outside auditors were expected to visit the facility. The claimant's conduct was disruptive and the employer considered that it created a potentially dangerous situation for other employees, therefore the claimant was issued a warning about his conduct and further warned not to engage in any intimidating or retaliatory behavior.

On or about February 20, 2010 Mr. Starkweather exchanged negative remarks with another hourly employee and removed the other employee's chair when the employee stood up. Based upon complaints that were made the employer invested and determined that Mr. Starkweather had again engaged in horseplay and/or intimidating behavior and the claimant was discharged from employment.

It is the claimant's position that he was warned unnecessarily on December 21, 2009 as the "pyramids" that he had constructed were not a danger and were constructed during time when it would not affect company business. It is the claimant's further position that during the incident of February 20, 2010 the other employee also engaged in behavior which caused the conduct between the parties to escalate.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Starkweather was discharged for misconduct in connection with the employment. It does.

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.

Here the evidence in the record establishes that Mr. Starkweather had been specifically warned for engaging in nonproductive behavior/horseplay on December 21, 2009 and that the claimant continued to engage in similar conduct after being warned. The claimant knew or should have known based upon the previous warning that was served upon him that disruptive conduct,

horseplay or nonproductive activities during work in the future would result in his termination from employment. On February 20, 2010 the evidence in the record establishes that the claimant engaged in name-calling and horseplay. Misconduct after being warned showed a willful disregard of his employer's interests and standards of behavior and thus was disqualifying under the provisions of the Employment Security Act.

The claimant has received unemployment benefits to which he is not entitled. The question of whether the claimant must repay those benefits is remanded to the UIS Division.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

DECISION:

The representative's decision dated March 18, 2010, reference 01, is reversed. Daniel Starkweather is disqualified and benefits are withheld until the claimant has worked in and earned wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to the UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

css/css