

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEVIN R FLEMING
Claimant

APPEAL NO. 09A-UI-16574-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA
Employer

OC: 09/20/09
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(1) – Definition of Misconduct

STATEMENT OF THE CASE:

The claimant appealed a department representative's decision dated October 23, 2009, reference 02, that held he was discharged for misconduct on July 29, 2009, and benefits are denied. A telephone hearing was held on December 10, 2009. The claimant participated. Michael Alphson, Supervisor; Eric Hubbard, Team Leader; and Megan Armstrong, Manager, participated for the employer.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses, and having considered the evidence in the record, finds that: The claimant worked as a full-time collector in the credit card division of the employer from May 12, 2008 to July 29, 2009. The claimant initialed that he received the employer policy regarding professionalism. It is a violation of policy to use profanity or disparaging language.

The claimant's daughter passed away on August 8, 2008, and he has participated in bereavement support groups. The claimant was feeling some workplace stress due to working more than forty hours, and grieving the one-year anniversary of his daughter's death in late July 2009. The claimant requested a schedule adjustment to reduce his workload that was denied.

While concluding a call review by team leader Hubbard on July 28, the claimant said "this is bullshit –fuck this". The claimant requested and was granted permission to leave the room. A short time later, the claimant commented in the presence of Hubbard, "I'll bet he wouldn't fail her fucking calls" (in reference to Hubbard's girlfriend who is also a collector). Due to employee reactions, the employer believed that the claimant could be heard by co-worker collectors, and that it may be heard by customers that were on the line.

The employer disciplinary policy provides that the use of profanity violation may be subject to warning or termination for a first offense. The employer considered the claimant's conduct to be serious enough to terminate him, and it did so on July 29.

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 administrative law judge concludes the employer failed to establish misconduct in the discharge of the claimant on July 29, 2009, because the claimant's use of profanity was an isolated incident under stress, and he had received no prior warning for similar conduct.

The employer was insensitive to the claimant's grieving at the one-year anniversary of his daughter's death when he requested a work schedule adjustment prior to the July 28 incident. The claimant threatened no one, and he was not insubordinate to his supervisor. The likelihood that any customer heard the profanity is remote that is one of the reasons the employer offers as a reason for termination for a first offense rather than a warning.

DECISION:

The decision of the representative dated October 23, 2009, reference 02, is reversed. The claimant was not discharged for misconduct in connection with employment on July 29, 2009. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/css