

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ALEX K GORDON

Claimant

APPEAL NO: 09A-UI-05112-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA

Employer

OC: 03/01/09

Claimant: Respondent (2/R)

Section 96.5-2-a – Discharge

Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Wells Fargo Bank, N.A. (employer) appealed a representative's March 24, 2009 decision (reference 01) that concluded Alex K. Gordon (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 28, 2009. The claimant participated in the hearing. Justin Kemei appeared on the employer's behalf and presented testimony from one other witness, Mark Grittmann. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on August 28, 2006. He worked full time as a customer service representative at the employer's West Des Moines, Iowa mortgage service call center. His last day of work was March 3, 2009. The employer discharged him on that date. The stated reason for the discharge was repeated rudeness, unprofessionalism, and lack of empathy toward customers after prior warning.

The claimant had been given a first final warning on August 8, 2007, and a second final warning on November 19, 2008. The second final warning was specifically addressing issues of rudeness, unprofessionalism, and lack of empathy in calls with customers. Additionally, the claimant's immediate supervisor, Mr. Kemei, had been verbally coaching him on such issues.

On January 30, 2009 the claimant handled a call which was ultimately transferred to another level; the person who reviewed the matter after the transfer informed Mr. Kemei that there had been a problem with the claimant's handling of the call, resulting in Mr. Kemei's review of the call recording. In the call the claimant first responded to the customer's explanation of a problem about a fee by asking with a sarcastic tone, "what do you want me to fix?" He did not

seek to find any solution, and interrupted the customer's further explanation, saying that he was "not going to listen to this stuff," and was transferring the call to another area. The caller had not been loud or abusive during the call. As a result of Mr. Kemei's review of this call, he was already recommending to his superiors that the claimant be discharged.

Before the employer made its final discharge decision, there were three more incidents, most recently on March 2, 2009. In that call the customer was calling about a misapplication of a payment, and indicated that the customer was frustrated with having to call to deal with the situation, to which the claimant responded, "well, you didn't have to call." The customer responded that this was offensive; Mr. Kemei also reviewed this call and concurred that the claimant's demeanor toward the customer was rude, unprofessional, and non-empathic. As a result of these continued issues after the second final warning, the employer discharged the claimant.

The claimant established a claim for unemployment insurance benefits effective March 1, 2009. The claimant has received unemployment insurance benefits after the separation from employment in the amount of \$2,785.00.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The claimant's continued rude, unprofessional, and non-empathetic conduct toward customers after prior warning shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be

recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded the Claims Section.

DECISION:

The representative's March 24, 2009 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of March 1, 2009. This disqualification continues until the claimant has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css