

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ALEX J DUFFY

Claimant

APPEAL NO. 14A-UI-06133-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA

Employer

OC: 05/04/14

Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.26(21) – Quit in Lieu of Discharge

STATEMENT OF THE CASE:

Alex Duffy filed a timely appeal from the June 6, 2014, reference 02, decision that disqualified him for benefits. After due notice was issued, a hearing was held on July 8, 2014. Mr. Duffy participated personally and was represented by attorney John Duffy. The employer waived its presence at the hearing. The hearing in this matter was consolidated with the hearing in Appeal Number 14A-UI-06134-JTT. Exhibit A was received into evidence. The administrative law judge took official notice of the agency's administrative record of benefits disbursed to the claimant.

ISSUE:

Whether Mr. Duffy separated from the employment for a reason that disqualifies him for unemployment insurance benefits or that relieves the employer of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Alex Duffy was employed by Wells Fargo Bank on a full-time basis from 2000 and last performed work for the employer on May 8, 2014. Mr. Duffy worked as a home mortgage consultant. During the last 14 months of the employment, Mr. Duffy was only able to close on 15 loans. Mr. Duffy attributes the low production to the economy and the competitive nature of the business. Mr. Duffy's supervisor was Terry Gearheart, Branch Manager. Toward the end of the employment, Mr. Gearheart made it clear to Mr. Duffy that he was not performing to the employer's satisfaction and that it was the employer's desire that he resign from the employment. In May 2014, Mr. Gearheart told Mr. Duffy that if Mr. Duffy did not resign, he would be placed on a performance improvement plan and would have to produce 18-20 loans in the coming 60 days or face discharge from the employment. Mr. Duffy and Mr. Gearheart both knew that it would be impossible for Mr. Duffy to satisfy the terms of the proposed performance improvement plan and that Mr. Duffy would be discharged at the end of the 60 days. When

Mr. Duffy indicated that he did not wish to resign from the employment, Mr. Gearheart strongly encouraged Mr. Duffy to resign from the employment and told Mr. Duffy that if he resigned, the employer would not challenge a claim for unemployment benefits. Faced with pressure from the employer to resign, Mr. Duffy acquiesced.

REASONING AND CONCLUSIONS OF LAW:

The employer's election to waive participation in the hearing lends additional weight to Mr. Duffy's testimony that he was compelled to resign from the employment under threat of certain discharge to follow if he did not resign. It was only at the employer's insistence that Mr. Duffy acquiesced in resigning from the employment. The quit was not voluntary. The employer took a carrot-and-stick approach that included a promise that the employer would not challenge a claim for unemployment insurance benefits.

871 IAC 24.26(21) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

In analyzing quits in lieu of discharge, the administrative law judge considers whether the evidence establishes misconduct that would disqualify the claimant for unemployment insurance benefits.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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 waived participation in the hearing and did not present evidence to support the notion that Mr. Duffy's separation was voluntary or that his separation was based on misconduct in connection with the employment. The weight of the evidence indicates that Mr. Duffy was unable to perform to the employer's satisfaction. Absent proof from the employer that Mr. Duffy's performance was based on a pattern of carelessness and/or negligence or an intentional disregard of the employer's interests, the evidence indicates an involuntary separation for no disqualifying reason. Accordingly, Mr. Duffy is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The claims deputy's June 6, 2014, reference 02, decision is reversed. The claimant quit in lieu of discharge. The involuntary separation was for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs