

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MEREDITH A HOWARD

Claimant

APPEAL NO. 16A-UI-10120-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA

Employer

OC: 08/14/16

Claimant: Appellant (1)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Meredith Howard filed a timely appeal from the September 15, 2016, reference 02, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on an agency conclusion that Ms. Howard was discharged on August 19, 2016 for misconduct in connection with the employment. After due notice was issued, a hearing was held on September 30, 2016. Ms. Howard participated. Larry Lampel of Barnett Associates represented the employer and presented testimony through Genya Tolmatsky and Jay Singleton. Exhibits 1, 2, 5 and 6 were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Meredith Howard was employed by Wells Fargo Bank North America as a full-time Inbound Sales Specialist from September 2015 until August 19, 2016, when the employer discharged her for intentionally avoiding inbound and outbound sales telephone calls and for documenting that she had left a message in connection with the outbound calls when she had not in fact left a message. Ms. Howard was responsible for receiving inbound calls from prospective mortgage loan customers. Ms. Howard was also responsible for making outbound calls to prospective mortgage loan customers who had made an online inquiry and provided telephone contact information. Ms. Howard had received appropriate training and was familiar with the employer's call handling procedures.

The employer discovered 31 problematic inbound calls for the period of July 17, 2016 through August 17, 2016. Those calls were routed to Ms. Howard's computer and phone by the employer's computer software. Ms. Howard would receive notice of the call on her computer screen. If Ms. Howard was working from home, the incoming call would be routed to her personal cell phone. In the 30 instances reviewed by the employer, the call appeared on Ms. Howard's computer, her phone received the call, but Ms. Howard did not answer the call.

Instead, the automated message on Ms. Howard's cell phone stated to the caller that a voicemail box had not been set up. Ms. Howard attributes the problems with the incoming calls to her cell phone not ringing to give notice of an incoming call. The final problematic inbound call occurred on August 17, when Ms. Howard was working from the employer's office and using the employer's phone equipment. In that instance, Ms. Howard answered the call, provided an initial scripted greeting, and then terminated the call before the prospective customer had a chance to respond.

The employer also identified 12 problematic outbound calls for the period of July 31, 2016 through August 17, 2016. Ms. Howard initiated those calls, encountered an answering machine, failed to leave a voice mail message in violation of the employer's established procedure, but documented that she had left a message. Each of these calls was the initial call to the customer on the date in question.

REASONING AND CONCLUSIONS OF LAW:

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 weight of the evidence in the record establishes that Ms. Howard did indeed engage in a pattern of behavior whereby she intentionally avoided handling phones calls to or from prospective customers. While Ms. Howard asserts a technical basis for her handling of the 31 problematic incoming calls, the weight of the evidence suggests that the ringer on Ms. Howard's cell phone was most likely turned off. Even if the evidence had supported Ms. Howard's testimony regarding the problematic inbound calls that were routed to her personal cell phone, that would not explain her handling of the inbound call from the her workstation on August 17 or her handling of the 12 problematic outbound calls. The weight of the evidence indicates that Ms. Howard acted with willful and wanton disregard of the employer's interests when she engaged in a pattern of failing to leave a message in connection with those outbound calls, but documenting that she had indeed left a message.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Howard was discharged for misconduct. Accordingly, Ms. Howard is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Howard must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The September 15, 2016, reference 02, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs