BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

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| GARY A ROWLET<br><br>Claimant,<br><br>and<br><br>WELLS FARGO BANK NA<br><br>Employer. | : | HEARING NUMBER: 08B-UI-05523<br><br>EMPLOYMENT APPEAL BOARD DECISION |

## N O T I C E

**THIS DECISION BECOMES FINAL** unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

**A REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

**SECTION:** 96.5(2)a

## D E C I S I O N

**UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE**

**FINDINGS OF FACT:**

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

The claimant, Gary A. Rowlet, worked for Wells Fargo Bank, NA from November 15, 2005 through May 13, 2008 as a full-time customer service representative (CSR) responsible for taking incoming calls. (Tr. 2-3, 4, 5, 11) CSRs must follow certain protocol to answer calls depending on the questions posed by the customers. CSRs must never cross-sell a product unless the original question involves a related product. For example, if a customer brings up homeowner's insurance or questions regarding an escrow product, the CSR may sell a cross-sell product for which they will receive a monetary reward for selling that product. (Tr. 7-8) To ensure that CSRs comply with the company's policy, the employer randomly monitors these calls based on the tracking sheet that records them. (Tr. 7) A CSR's failure to

comply with this procedure could result in a compliance issue for the employer. (Tr. 9)



In May of 2006, the employer issued a verbal warning via e-mail to Mr. Rowlet for a compliance issue regarding a cross-sell. (Tr.10, 16) Mr. Rowlet had inappropriately made a cross-sell on homeowner's insurance when the customer made no such mention of it, and did not qualify. (Tr. 7-8, 10, 13-14, 17) He was instructed to make sure the customer paid "… over $800 a year and that their home [was] 20 years older or less…" (Tr. 13) The claimant received a written warning in January of 2007 regarding a cross-sell incident with refinance. (Tr. 10, 16)

The employer made "… a lot of cross-sell techniques changes…" that the CSRs were expected to keep abreast. (Tr. 13, 17-18) The claimant did not always keep track of these changes because of time constraints. (Tr. 18) At or around May 5, 2008 (Tr. 7), the employer, through another random QC trace call, discovered that Mr. Rowlet picked up a call from a customer who received a letter about refinance. (Tr. 6, 10) Instead of forwarding the call to the refinance department, the claimant went through a cross-sell window (on the computer screen), as he'd always done (Tr. 14-15), where he "… [recorded] at attempt or a referral [for himself]." (Tr. 6) The employer determined that this was another cross-sell violation. Mr. Rowlet did not know that he was supposed to directly transfer a refinance call to the refinancing department (Tr. 14), as he had never received a prior warning regarding this type of transaction. (Tr. 18, 19) The employer terminated Mr. Rowlet for making a 'fraudulent cross-sell attempt, i.e., violation of the company's Code of Ethics. (Tr. 4, 5, 11-12)

## REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2007) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
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> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

The claimant provided credible testimony that he always transfers calls through the cross-sells window, which the employer did not refute. Instead, the employer merely testified that this practice was wrong. Although the employer argues that the claimant had two previous warnings against this practice, the May 2006 verbal warning is too remote in time to have significant bearing on the claimant's termination two years later.

Both parties acknowledge that the company rules for cross-selling techniques constantly changed. Mr. Rowlet admitted that he didn't always keep up with such changes which can be reasonably attributed to his error in sending a refinance call directly through the cross-sell window that appears to have been his practice, which was never corrected. (Tr. 14) At worst, the claimant's final act was the result of poor judgment or, at the very least, a good faith error that didn't rise to the legal definition of misconduct. Even the employer admitted that he had never been warned about the practice of direct refinance calls through the cross-sell window. (Tr. 19) For these reasons, we conclude that the employer failed to satisfy their burden of proof.

## DECISION:

The administrative law judge's decision dated July 1, 2008 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits provided the claimant is otherwise eligible. Additionally, the overpayment assessed based on the administrative law judge's previous decision no longer exists.

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John A. Peno

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Elizabeth L. Seiser

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DISSENTING OPINION OF MONIQUE F. KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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Monique Kuester

A portion of the claimant's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence (documents) were reviewed, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

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John A. Peno

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Elizabeth L. Seiser

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Monique F. Kuester

AMG/kjo