

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GINA M EMERY

Claimant

APPEAL NO. 13A-UI-04603-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA

Employer

OC: 03/31/13

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Gina Emery filed a timely appeal from the April 15, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 22, 2013. Ms. Emery participated. On May 20, 2013, the employer, through Barnett Associates, filed written notice that the employer was waiving its participation in the appeal hearing.

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: Gina Emery was employed by Wells Fargo North America as a full-time Loan Document Specialist 3 from 2011 until March 5, 2013, when Casey Pritchard, Loan Administration Manager, and Greg Belzer, Loan Administration Manager 2, discharged her from the employment. Ms. Pritchard was Ms. Emery's immediate supervisor. On March 4, 2013, Ms. Emery used profanity in the workplace. A coworker reported the utterance to a supervisor and Ms. Pritchard issued a written reprimand to Ms. Emery for unprofessional conduct. Later that same day, Ms. Emery asked multiple coworkers whether they had said anything negative about her. On March 5, Ms. Pritchard and Mr. Belzer summoned Ms. Emery to a meeting. They asked Ms. Emery whether she had indeed questioned coworkers the previous day about reporting Ms. Emery to the employer. Ms. Emery told the employer she had. Ms. Pritchard told Ms. Emery that the conduct of questioning coworkers violated the employer's policy of keeping workplace complainant's anonymous. The employer notified Ms. Emery that she was discharged for violating that policy. The employer then escorted Ms. Emery from the workplace. Ms. Emery had previously been unaware of the policy or that her questioning of coworkers was in violation of employer policy.

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 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) alone. 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, thereby, did not present any evidence to support the allegation that Ms. Emery was discharged for misconduct in connection with the employment. The evidence in the record establishes that Ms. Emery made a good faith error in judgment and unwittingly ran afoul of the employer's complaint reporting policy by asking coworkers whether they had spoken negatively about her. The evidence in the record is insufficient to establish that Ms. Emery acted with willful or wanton disregard of the employer's interests. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Emery was discharged for no disqualifying reason. Accordingly, Ms. Emery is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The Agency representative's April 15, 2013, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs