

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RICHIE G ELWELL
Claimant

APPEAL NO. 11A-UI-01438-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA
Employer

**OC: 01/02/11
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Richie Elwell filed a timely appeal from the January 27, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 14, 2011. Mr. Elwell did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Merle Walker of Barnett Associates represented the employer and presented testimony through Lauren Mersberger, Christina Hawkins, and Randy Rath. Exhibits One through Ten 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: Richie Elwell was employed by Wells Fargo Bank NA as a full-time Collector I from November 2009 until January 4, 2011, when Randy Rath, Collections Manager, and Lauren Mersberger, Collections Supervisor, discharged him for attendance. Ms. Mersberger was Mr. Elwell's immediate supervisor from October 18, 2010 until the end of the employment. Christina Hawkins, Collections Supervisor was Mr. Elwell's immediate supervisor from the start of the employment until October 18, 2010.

The final incident that triggered Mr. Elwell's discharge was his late return from a break on December 28, 2010. Mr. Elwell returned 23 minutes late from a 15-minute paid break. When Ms. Mersberger confronted Mr. Elwell about his tardy return from break, Mr. Elwell indicated he must have lost track of time. Mr. Elwell was then late to work on December 30, 2010 for personal reasons.

In making the decision to discharge Mr. Elwell, the employer considered earlier tardiness matters. Mr. Elwell was late to work for personal reasons on July 11, August 17 and 24, September 20, November 27, and December 15, 2010.

The employer issued reprimands to Mr. Elwell for tardiness. These were issued on September 1, 2010, September 29, 2010, and November 29, 2010. In addition, the employer noted its concern about Mr. Elwell's tardiness issues as part of the employer's monthly documentation of Mr. Elwell's work performance.

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). 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).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The evidence in the record establishes excessive unexcused tardiness. The evidence establishes unexcused tardiness on July 11, August 17 and 24, September 20, November 27, and December 15, 28, and 30, 2010. The tardiness occurred in the context of repeated reprimands for tardiness. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Elwell was discharged for misconduct. Accordingly, Mr. Elwell is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Elwell.

DECISION:

The Agency representative's January 27, 2011, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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