

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRITTANY M FISHER
Claimant

APPEAL NO. 12A-UI-05958-VST

WELLS FARGO BANK NA
Employer

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/29/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a decision of a representative dated May 18, 2012, reference 01, which held that the claimant was not eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 18, 2012. Claimant participated. The employer participated by Sara Tullie, loan administration manager. The employer was represented by Kelly Landolfi. The record consists of the testimony of Sara Tullie and the testimony of Brittany Fisher.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The claimant worked as a home preservation specialist for the employer in its Des Moines, Iowa, office. The claimant was hired on February 12, 2007. Her last day of work was May 2, 2012. She was terminated on May 3, 2012.

The claimant was terminated due to a negative background check. The employer was required to do a background check on its employees after new regulations were adopted by the Federal Deposit Insurance Corporation (FDIC) in December 2011. Sara Tullie, the loan administration manager, does not know when the background check was requested; when the results were received; or even what the results were. She was simply told that the claimant had to be terminated due to the negative background check. The new regulations gave the employer no alternative but to terminate the claimant.

The claimant believes that the negative background check was due to a simple misdemeanor back in November 2008. She was given a deferred sentence and the charge was expunged from her record.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8) See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988) The employer has the burden of proof to establish misconduct.

There is insufficient evidence in this record to conclude that the claimant was discharged for a current act of misconduct. Ms. Tullie, who was the individual who terminated the claimant, was

told to terminate the claimant due to a negative background check. Ms. Tullie could not testify on why the background check was negative or when the information was received by the employer on the background check. The claimant thought it might be due to a deferred judgment on a simple misdemeanor that was expunged from her record. The misdemeanor occurred back in 2008. Absent some definitive information on why the claimant was terminated and when the employer knew about the negative background check, the administrative law judge lacks enough evidence to conclude that there was a discharge for a current act of misconduct. Accordingly, benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated May 18, 2012, reference 01, is reversed. insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs