

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANDREA L LANGFORD
Claimant

APPEAL NO. 10A-UI-06279-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA
Employer

OC: 03/21/10
Claimant: Appellant (2)

Section 96.5-2-A -- Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated April 14, 2010, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 7, 2010. Claimant participated. The employer stated in writing that it would not participate in the hearing. The record consists of the testimony of Andrea Langford.

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 full-time loan adjuster specialist. She was hired as a contract employee in November 2001 and then hired directly on May 20, 2002. She was terminated on March 24, 2010, for what the employer believed to be excessive absenteeism.

The claimant was absent from work on March 22, 2010, and March 23, 2010. She was in the hospital with back spasms. The claimant called her employer on both days prior to the start of her shift at 8:00 a.m. to inform her supervisor that she would not be able to come to work. The claimant had approved Family Medical Leave Act (FMLA) leave from her employer as a result of the back condition for which she had been hospitalized on March 22, 2010, and March 23, 2010.

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.

Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Absence due to illness and other excusable reasons is deemed excused if the employee properly notified the employer. See Higgins, supra, and 871 IAC 24.32(7). 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). The employer has the burden of proof to show misconduct.

There is no evidence of misconduct in this record. The claimant may have been absent from work on March 22, 2010, and March 23, 2010, but her absence was due to illness properly reported to the employer. In addition, the claimant had FMLA leave to cover her back condition, which was chronic. The employer did not participate in the hearing and did not, therefore, provide evidence on why the claimant was discharged for absenteeism. Benefits are allowed.

DECISION:

The decision of the representative dated April 14, 2010, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css