

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VICKI SUE A BOUGHTON
Claimant

APPEAL NO. 100-UI-13660-MT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 04/18/10
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated May 10, 2010, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on July 12, 2010. Employer participated by Maria Green, Shift Manager. Claimant failed to respond to the hearing notice and did not participate. Exhibits One, Two, Three, and Four were admitted into evidence. This matter was remanded by the Employment Appeal Board September 23, 2010 for further consideration on the issue of when employer discovered the infraction in relation to the discharge date. There is no order to take new and additional evidence based on a good cause showing. This review is limited to an expansion of the record on the issue of actual notice of the infraction.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds: Claimant last worked for employer on April 20, 2010.

Claimant was discharged on April 20, 2010 by employer because claimant accepted gifts from a vendor. Employer has a strict rule that prohibits acceptance of gifts. Employer discharges on the first offense for this rule violation. (Tr. 3, lines 13-14) Employer discovered the violation about two weeks prior to the discharge. (Tr. 2, lines 23-27) The date of the incident was also identified by claimant as a couple weeks prior, in her hand written statement. Exhibit 1, 2, 3 and 4. It is found that the infraction occurred two weeks prior to the discharge. Employer was generously granted the opportunity to identify the date of the infraction and the date of discovery but completely failed to provide any evidence. (Tr. 2, lines 19-22) Employer stated: "Like I said, I can't find the paperwork here that says the dates that she was-I know they've got it on videotape, though, that they said she did it." (Tr. 2, lines 21-22) Employer indicated that they have evidence of the infraction dates on videotape which should have answered all the pending questions. (Tr. 2, lines 21-22) Employer failed to offer a copy of the video tape as evidence notwithstanding the fact that employer offered four copies of its exhibits on May 20, 2010; July 8, 2010; July 9, 2010; and July 9, 2010, respectively. Employer did not suspend claimant pending the investigation. (Tr. 3, lines 28-30)

Claimant had a final warning on her record. (Tr. 3, lines 2-14) Claimant was informed that accepting gifts from vendors is dischargeable on the first offense. (Tr. 3, lines 13-26)

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.

871 IAC 24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The gravity of the incident, number of policy violations, and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning accepting gifts from vendors. Claimant was warned concerning this policy.

The last incident, which brought about the discharge, fails to constitute misconduct because employer failed to take prompt action on the incident and failed to identify the date of discovery of the incident. The infraction was a couple weeks old. This is too stale to constitute a current act. Employer had in its possession videotape evidence that would have established the date of the infraction and the actual date of discovery. Employer was offered ample opportunity both before and during the hearing to submit evidence of the infraction and the date of discovery. Notwithstanding these opportunities, employer failed woefully in that regard. An adverse inference is created when employer failed to present evidence in its possession that would answer important evidentiary questions. Employer's failure to offer the videotape evidence and documents of date of discovery is held as evidence weighing against its case in chief. Clearly, employer had access to all the documents and videotape prior to hearing. The submission of four sets of exhibits dramatically and graphically indicates that employer was not caught by surprise with this evidentiary proceeding. It is held that employer failed to establish the actual date of the infraction and actual date of discovery because of a failure to submit documents and videotape in its possession. The right questions were asked but employer could not answer notwithstanding full access to the documents and video concerning the incident. To re-hear this matter would allow employer to offer new and additional evidence without a showing of good cause as to why that evidence was not offered at the first hearing. This is a due process violation, a second bite at the apple caused by employer's ill preparation for hearing. Employer has the burden of proof. Employer having established no current act for which misconduct can be evaluated has failed to prove misconduct. The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated May 10, 2010, reference 01, is affirmed as amended. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements. Employer has the right to re-appeal from this decision. Appeal to the Employment Appeal Board from this matter is not automatic from an amended decision.

Marlon Mormann
Administrative Law Judge

Decision Dated and Mailed

mdm/kjw