

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES RASMUSSEN
Claimant

APPEAL NO. 07A-UI-08297-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 07/29/07 R: 04
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc. (employer) appealed an unemployment insurance decision dated August 24, 2007, reference 01, which held that James Rasmussen (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 13, 2007. The claimant participated in the hearing. The employer participated through Tana Lindaman, Asset Protection Coordinator and Kathy Anderson, Co-Manager. Employer's Exhibits One and Two were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the employer discharged the claimant for work-related misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed full-time from November 24, 1998 through July 30, 2007 and was most recently working as a department manager of candy. He was discharged for violating the employer's ethics policy regarding gifts and gratuities. The policy provides that neither employees nor departments may request, encourage or accept a gift or gratuity from a supplier, potential supplier or any person who he believes may seek to influence any business decision or transaction involving Wal-Mart. Suppliers may not donate items to Wal-Mart for the purpose of raising funds for charities or non-profit organizations. Any gift or gratuity received from a supplier must be returned with an explanation of the policy and any offer of a gift or gratuity must be reported to the supervisor.

On a Friday in the early part of July 2007, a co-manager saw a Hershey's vendor placing boxes of candy in the claimant's truck in the parking lot. The co-manager reported the incident to the asset protection coordinator. Both individuals walked out to the claimant's truck and saw the products which included two boxes of Twizzlers and three large bags of Jolly Ranchers. Pictures were taken of the products and the surveillance tapes were reviewed from when the

vendor placed the items in the claimant's truck to the point when the claimant left the parking lot in his truck. The incident was reported to the employer who spoke to the claimant a week or two later. The claimant admitted that the Hershey vendor provided candy to the claimant for parades in which he participated. He is part of a non-profit demolition derby group and he even asked the Hershey vendor whether he would like to be a sponsor for the claimant. The claimant also admitted he had accepted candy once before. The employer discharged him on July 30, 2007.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

Iowa Code § 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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful

wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

The claimant was discharged for blatantly violating the employer's ethics policy regarding gifts and gratuities. He admitted violating the policy at least twice and his claim of ignorance regarding the policy is doubtful, particularly since he was a department manager. While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge or disciplinary suspension 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). The employer could not provide the specific date when the offense occurred the second and most recent time but suggested it occurred on July 13, 2007. The claimant believed it occurred at the beginning of July 2007 and did indicate he was participating in a fourth of July parade. However, the employer did not discharge him until July 30, 2007 and did not provide any reasonable explanation for its delay. Inasmuch as the employer has not established a current or final act of misconduct, benefits are allowed.

DECISION:

The unemployment insurance decision dated August 24, 2007, reference 01, is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css