IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JEFFREY D HOUSE Claimant **WAL-MART STORES INC** Employer	**APPEAL 15A-UI-05407-KC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/12/15** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a - Discharge for Misconduct
Iowa Code § 96.5(1) - Voluntary Quit

STATEMENT OF THE CASE:

The claimant filed an appeal from the April 27, 2015, (reference 01) unemployment insurance decision that denied benefits. The claimant requested a postponement. The parties were properly notified about the rescheduled hearing. A telephone hearing was held on July 20, 2015. The claimant participated. The employer representatives and witnesses were registered but did not respond to two calls by the administrative law judge.

ISSUE:

Was the claimant discharged for disqualifying, work-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a produce associate from May 2011, and was separated from employment on April 14, 2015, the last day that he worked.

Twillia Sweets, a store manager, terminated the claimant's employment due to inappropriate conduct by clocking in early without approval from an immediate supervisor. The claimant had a ride to work an hour early. He would wait in the break-room until his 4:00 a.m. shift would start. Sometimes the overnight managers on duty would ask him to clock in early to replenish the produce that was depleted overnight. His direct managers were not on duty when he arrived at work.

His immediate supervisor was Jeremiah. The claimant was asked to clock in early by managers on March 12 and March 25, 2015. The last day that he came in early was April 10, 2015, and his direct supervisor Jeremiah directed him to clock-in early.

The claimant received two verbal warnings about clocking in early based on being told to do so by a member of management, that may not have been his director supervisor. No consequences were identified regarding punching in early. He had not understood that he could not respond to a direct order from a manager on duty or that all store or department managers

did not have the authority to give such orders. The employer submitted no documentation of the rules regarding clocking in and the members of management who are authorized to perform an override of the originally scheduled start time.

Sweets said that he left his shift one hour early, after receiving a directive to clock in early, and he worked his full shift and did not work overtime. There was no complaint about his work. In the termination meeting, Sweets referred only to the last date he clocked in early at the direction of his direct supervisor. She indicated Jeremiah did not have the authority to so direct him. Sweets indicated that his employment was terminated because she was giving him a third warning in the termination meeting. The claimant had not been aware that his job was in jeopardy for clocking in early at the direction of various managers. He knew of some employees who had been terminated after three warnings. The claimant received conflicting instructions from multiple members of management about clocking in early, even after being directed to do so managers on duty.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony while the employer did not participate, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(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.

Iowa Admin. Code r. 871-24.32(9) provides:

> (9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

Iowa Admin. Code r. 871-24.32(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.

In reviewing past acts as influencing a current act of misconduct, the ALJ should look at the course of conduct in general, not whether each such past act would constitute disqualifying job misconduct in and of itself. *Attwood v. Iowa Dep't of Job Serv.*, No. _-__, (Iowa Ct. App. filed __, 1986).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation.

A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

Where the claimant was required to work in two separate positions and received contradictory instructions from two different supervisors and quit after being reprimanded for his job performance he was entitled to benefits. *McCunn v. EAB*, 451 N.W.2d 510 (Iowa App. 1989). Insubordination does not equal misconduct if it is reasonable under the circumstances.

The claimant received conflicting instructions from multiple members of management and his own direct supervisor. He believed he could not ignore a direct order from someone in management, especially when he was one of few employees in the store between 3:00 and 4:00 a.m. Miscommunication or lack of communication between various members of the employer's management contributed significantly to the confusing situation. Despite management's communication lapses, the claimant is the individual who was terminated.

The employer's decision to issue a final warning in the termination meeting suggests that it did not intend to comply with its own rules in this case. The final incident in which the claimant clocked in early at the instruction of his direct supervisor, as he had been told he could do in a verbal warning, is not a final act of misconduct. The claimant could not have changed his behavior after receiving a final warning in his termination meeting.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Benefits should be allowed.

DECISION:

The April 27, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The benefits claimed and withheld shall be paid, provided he is otherwise eligible.

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Kristin A. Collinson
Administrative Law Judge

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Decision Dated and Mailed

kac/pjs