

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

THAD C WELLER
Claimant

APPEAL NO. 09A-UI-10431-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 06/07/09
Claimant: Respondent (2-R)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 8, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 7, 2009. Claimant Thad Weller participated and presented additional testimony through his father, Tim Weller. Thomas Baumgartner, Asset Coordinator, represented the employer. Exhibits One through Five were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Thad Weller was employed by Wal-Mart as a full-time Tire, Lube Express (TLE) Tech from August 2005 until June 12, 2009, when Thomas Baumgartner, Asset Coordinator, notified him he was discharged from the employment due to theft of services. Brian Hoag, Store Manager, had made the decision to discharge Mr. Weller from the employment.

On March 3, 2009, Mr. Weller brought to the workplace four tires he had purchased for his personal vehicle. Mr. Weller had Wal-Mart staff balance and mount the tires onto his vehicle. Mr. Weller paid for the mounting service. That amount was \$14.00 without tax. Mr. Weller did not pay for balancing the tires that day or for the lifetime rotation and balance benefit he received in connection with the transaction. The value of a one-time balance service was \$30.00. Another employee, Brandi Stansberry, rang up the transaction without charging Mr. Weller for all of the services he had received. Mr. Weller offered to pay for the additional service(s), but did not in fact pay for the services or take any steps to report to the employer that he had received services for which he had not been charged. Ms. Stansberry is still with the employer, but did not testify. Mr. Weller paid cash and did not use the employee discount card that would have provided him with a 10 percent discount. The use of the employee discount card would also have generated a record of an employee purchase that would make it easier for the employer to review the transaction.

On May 28, 2009, Mr. Weller had Wal-Mart staff balance and rotate the tires on his personal vehicle and did not pay for this service. The value of the service was \$30.00. During the first week in June 2009, an employee who had worked on the car reported to the employer that Mr. Weller had received services without paying for them. The employer reviewed the relevant work orders and the receipt from the March 3 transaction. These materials established that Mr. Weller had paid only for the March 3 mounting service.

On June 12, Mr. Baumgartner interviewed Mr. Weller about receiving services without paying for them. Mr. Weller provided a statement and implicated other employees in ongoing unauthorized discounts or price overrides.

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge 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).

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. See 871 IAC 24.32(4). When it is in a party’s power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party’s case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The weight of the evidences establishes that Mr. Weller did in fact knowingly engage—on two occasions--in conduct he knew was clearly contrary to the interests of the employer. Mr. Weller attempts, unsuccessfully, to minimize his own culpability by highlighting the role others played in the same transactions or in additional unrelated transactions. The evidence indicates that on two occasions, approximately three months apart, Mr. Weller knowingly received services from Wal-Mart without paying for them. Mr. Weller knew he was required to pay for services he received from the employer. Mr. Weller’s conduct did in fact constitute theft from the employer and did in fact evidence a willful and wanton disregard of the employer’s interests. The fact that part of the conduct, or even all of the conduct, might have occurred while Mr. Weller was clocked out does not remove the connection between the misconduct and the employment. The fact that the conduct did not come to the employer’s attention until the first week of June does not in any way diminish the misconduct. The weight of the evidence is sufficient to establish that the employer took timely steps to investigate and address the matter with Mr. Weller once it learned of the misconduct. The evidence establishes a “current act” for unemployment insurance purposes.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Weller was discharged for misconduct. Accordingly, Mr. Weller is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer’s account shall not be charged for benefits paid to Mr. Weller.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant’s separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency’s initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's July 8, 2009, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs