

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SANDRA J SHIMAK
Claimant

APPEAL NO: 14A-UI-03577-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 03/02/14
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc. (employer) appealed a representative's March 24, 2014 (reference 01) decision that concluded Sandra J. Shimak (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known address of record, a telephone hearing was convened on April 29, 2014; it was reconvened and concluded on May 29, 2014. The claimant participated in the hearing and was represented by Nate Willems, Attorney at Law. Brendan Fitzgerald, Attorney at Law, appeared on the employer's behalf and presented testimony from one witness, Randy Samyn. During the hearing the Joint Exhibits One through Twelve, Claimant's Exhibits B and C, and Employer's Exhibits One through Six were entered 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:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on December 8, 2003. Since 2007 she worked full time as a pharmacy manager at the employer's Marion, Iowa store. Her last day of work was March 5, 2014. The employer discharged her on that date. The reason asserted for the discharge was being accountable for the fact that there was a pharmacy technician whose state registration was not current but that technician had been allowed to work.

The claimant hired a new part-time pharmacy technician on or about December 6, 2013. The technician represented to the claimant that she had both a current state registration and national certification. The claimant instructed the new technician to bring copies in. The technician started working on or about December 16; she had brought in a copy of the national

certification, but not a copy of the state registration, which she technically did need to work as a pharmacy technician. She told the claimant that she could not find the state registration but had asked the state to send her a copy. The claimant allowed the technician to work and told her to get the copy of the registration as soon as possible.

Between December 16 and March 4 the claimant worked some cross-over time with the new technician a handful of times. Several of the times she reminded the technician to get the state certification copy to her. On March 4 the market director, Samyn, came into the store and observed that there was a national certificate on the wall for the technician, but not a copy of a state registration. He then contacted the state board and learned that the technician's registration had expired on August 31, 2013.

The claimant was subject to the employer's "Health and Wellness Professional Accountability Matrix." Item two of that matrix identifies as an infraction "Knowingly or intentionally practicing, direction, or allowing any professional (including a pharmacist, technician . . .) to practice or perform duties without a required license/registration. This includes knowingly practicing, directing, or allowing an individual to practice on an expired license or without required supervision. No grace periods are permitted." The Matrix proves that the consequence of a first time infraction is termination. The employer concluded that the claimant had committed a violation of this provision by allowing the technician to work without first providing a copy of a valid state registration. As a result, the employer discharged the claimant.

REASONING AND CONCLUSIONS OF LAW:

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. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant was that she had not taken appropriate action to discover the fact that the pharmacy technician did not have a current state registration, but had allowed the technician to work without proof of a valid registration. Misconduct connotes volition and intent. A failure in job performance is not misconduct unless it is intentional. *Huntoon*, supra. Under the circumstances of this case, the claimant's reliance for just under three months on the technician's assertion that she had a valid registration was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion. While the employer may have had a good business reason for discharging the claimant, it has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's March 24, 2014 (reference 01) decision is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/can