

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

THAMAN J MILLER
Claimant

APPEAL NO. 08A-UI-06634-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 06/15/08 R: 02
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Wal-Mart Stores filed a timely appeal from the July 10, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 4, 2008. Claimant Thaman Miller did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Assistant Manager Gina Adams 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: Thaman Miller was employed by Wal-Mart as a part-time lawn and garden sales associate from April 20, 2008 until June 12, 2008, when Assistant Manager Gina Adams and Co-manager Angela Hansen discharged him for taking unauthorized breaks and for shopping on the clock.

The final incident that prompted the discharge occurred on May 30, 2008, when Mr. Miller took an unauthorized nine-minute break late in his shift. Earlier in the shift, Mr. Miller had taken an extended 23-minute break. The unauthorized break late in the shift came to the attention of Zone Supervisor Mariam Carr the same day, through a report from employee Nicole Tuinfte. Ms. Carr spoke to Mr. Miller about the matter, but employer witness Gina Adams does not know what Ms. Carr said to Mr. Miller. Ms. Carr reported the matter to Co-manager Angela Hansen. Ms. Hansen reviewed surveillance records to piece together Mr. Miller's break activity and confirm the late nine-minute break. The surveillance records revealed that Mr. Miller had purchased some trash bags at 4:38 p.m. and, after the purchase, went on break until 5:01 p.m. Ms. Tuinfte, Ms. Carr, and Ms. Hansen are still with Wal-Mart, but did not testify. On or about June 4 or 5, Ms. Hansen brought the matter to the attention of Assistant Manager Gina Adams. The employer did not again address the matter with Mr. Miller until June 12, when Ms. Adams and Ms. Hansen notified Mr. Miller that he was discharged from the employment. In the meantime, Mr. Miller had continued to report for work.

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 evidence in the record fails to establish a "current act" of misconduct. See 871 IAC 24.32(8). The evidence indicates that the conduct that prompted the discharge occurred on May 30, 2008. The weight of the evidence indicates that the employer waited until June 12, to notify Mr. Miller that his May 30 conduct subjected him to possible discharge from the employment. This 13-day lapse was unreasonable and caused to the May 30 conduct to no longer constitute a "current act."

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Miller was discharged for no disqualifying reason. Accordingly, Mr. Miller is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Miller. Because the evidence fails to establish a "current act," the administrative law judge need not consider whether the May 30 conduct was misconduct and need not consider the prior conduct. See 871 IAC 24.32(8).

DECISION:

The Agency representative's July 10, 2008, reference 01 decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css