

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

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5936 MAIN ST  
TROY MILLS IA 52344

WAL-MART STORES INC  
c/o FRICK UC EXPRESS  
PO BOX 283  
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-11074-LT  
OC: 09-05-04 R: 03  
Claimant: Respondent (1)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

Employer filed a timely appeal from the October 4, 2004, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on November 5, 2004. Claimant did participate. Employer did participate through Jeff Solomon and Jolene Aberle. Employer's Exhibit One was received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time receiving clerk through September 3, 2004, when he was discharged. Tim Timmer, Loss Prevention Supervisor, took over the investigation from Jolene Aberle. Employer did not confront claimant about any of the three issues until the date of separation and also accused him of theft as long as two years prior.

Greg Cason, Store Manager, fired claimant for "misconduct and an integrity issue" but would not provide details. Timmer led claimant to believe that it would be worked out if he signed the documents. (Employer's Exhibit One, pages 8, 9 and 10)

Claimant bought a small tripod with other merchandise on September 1 and was charged for the amount of a larger model tripod. That same day, he took the small tripod back to Kristy Cole in customer service to exchange for the large tripod but was only returned the money for the small tripod even though he had been overcharged for it as if it were the large model. He then brought the large tripod to the customer service desk to show her that he was overcharged and had not been refunded the full overcharge amount and wanted the difference back. She gave him money without counting it and apparently gave him the full amount of the tripod rather than the difference between the small and the large. Claimant did not count the money, as he was in a hurry and did not notice it was more than the difference he had requested.

About August 30, claimant asked for two pounds of crab legs that he thought were half the price. When he noticed the price difference, he realized he could not pay for those and left them in the cart outside the store where he was parked in the first spot next to the door. Although claimant did not remove the crab legs from the premises, he acknowledged that he should have returned them to the meat counter but was embarrassed to do so.

On or about August 16, claimant noticed an inkjet printer cartridge that was opened. A year or two ago, he had purchased a printer that did not come with the cartridge. Before leaving, claimant left the cartridge in plain view on his desk and the next day, he approached management to ask if he could use the opened item to replace the one that should have come with the printer. A customer who said she had lost \$350.00 in the trash compactor interrupted claimant and he went to management to ask about what they could do to help her. Claimant was upset that management would not do anything to help the customer and, as he returned to tell her that management would not assist in recovering her money, he laid the cartridge on a shelf outside the assistant manager's door and it never left the store.

#### REASONING AND CONCLUSIONS OF LAW:

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

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, 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 misconduct warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988).

An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. Inasmuch as employer had not previously warned or confronted claimant about any of the issues leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or negligently.

If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written) and reasonable notice should be given. Likewise, a coerced confession is not credible, especially when the loss prevention interrogator requires claimant to write that he took the item off company premises when he did not, and even if the coercion extends only to assuring claimant the issue could be worked out.

Leaving the crab legs in the cart by the store entrance was poor judgment resulting from fear of embarrassment and employer did not rebut claimant's credible explanation of the ink jet cartridge and the tripod. Claimant did not touch the cartridge after leaving it by the assistant manager's door and the customer service representative who gave claimant money back for the entire tripod rather than just the overcharge amount he was requesting was negligent in not counting the money to claimant. As cashier, it was her responsibility to ensure the proper transaction was made. Employer has failed to establish any act of misconduct and benefits are allowed, provided the claimant is otherwise eligible.

**DECISION:**

The October 4, 2004, reference 02, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

dml/b