

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**BRIAN D WOLBERT**  
Claimant

**WALMART INC**  
Employer

**APPEAL 19A-UI-06562-S1-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 07/21/19  
Claimant: Respondent (1)**

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Iowa Code § 96.5-2-a – Discharge for Misconduct  
871 IAC 23.43(9)a – Combined Wage Claim Transfer of Wages

**STATEMENT OF THE CASE:**

Walmart, Inc. (employer) appealed a representative's August 9, 2019 decision (reference 01) that concluded Brian Wolbert (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for September 12, 2019. The claimant participated personally. The employer participated by Norman Merrill, Store Manager. The employer offered and Exhibit One was received into evidence. The administrative law judge took official notice of the administrative file.

**ISSUE:**

The issue is whether the employer can be relieved of charges.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired in August 2017, and at the end of his employment he was working as a full-time salaried assistant store manager. The employer had a catalog of online policies. The claimant did not read the catalog or sign that he had received them. He did some computer based learning on some subjects.

The employer may have a policy that indicates that a disciplinary action does not expire on the expiration date indicated on the disciplinary action under certain circumstances. It may also have a policy that states that if an employee commits a fourth coachable offense, he will be terminated. The claimant never saw those policies.

In June 2017, the employer issued the claimant a verbal disciplinary action for not following the employer's hiring policy. This action expired on June 23, 2018. On January 25, 2018, the claimant acknowledged receipt of a disciplinary action for not working to cover employee meal breaks. This action expired on January 25, 2019. On April 12, 2018, the claimant acknowledged receipt of a disciplinary action for not working to cover employee meal breaks. This action expired on April 12, 2019. None of the three disciplinary actions notified the

claimant what would happen if he engaged in further infractions. The disciplinary actions did not indicate an extension of the expiration date for further disciplinary actions.

On February 6, 2019, the district manager visited and the claimant was required to attend additional meetings. Three employees called in sick that day. The claimant was unloading a grocery delivery truck in a backroom full of obstacles. He walked away from the power lift equipment (PLE) he was using to have a discussion with an employee and then returned to it. When he returned, his large toe on his right foot and the two adjacent toes were squeezed between the PLE he was using and the PLE next to it. The claimant sat for a moment recovering from the injury and then returned to work.

When the unloading job was done, he completed an accident report and sought medical attention at an emergency room. On February 6, 2019, he returned to work and finished his shift with one broken toe and two hyper-extended toes. On February 7, 2019, he went to a scheduled surgeon's appointment and was told not to work for one day. He returned to work on February 8, 2019, in a medically prescribed boot. The physician told him to wear the boot for approximately five weeks.

On February 21, 2019, the store manager and market asset protection manager met with the claimant to discuss the incident. The employer asked the claimant if on February 6, 2019, he could have been more aware of his surroundings. The claimant indicated that he could have been. Based on the claimant's answer, the employer determined that the claimant committed a coachable offense on February 6, 2019. The employer terminated the claimant on February 21, 2019.

Claimant has a cross wage claim with Illinois but earned wages from this employer in Iowa.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the employer is not relieved of charges.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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(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.

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 employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The final event occurred on February 6, 2019. The employer terminated the claimant two weeks later on February 21, 2019. The date of the incident and the date of the termination are too remote. Secondly, the employer was not able to provide any information that the claimant's actions were willful and deliberate. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

Iowa Admin. Code r. 871-23.43(9)(a) provides, in part:

(9) Combined wage claim transfer of wages.

a. Iowa employers whose wage credits are transferred from Iowa to an out-of-state paying state under the interstate reciprocal benefit plan as provided in Iowa Code section 96.20 will be liable for charges for benefits paid by the out-of-state paying state. No reimbursement so payable shall be charged against a contributory employer's account for the purpose of Iowa Code section 96.7, unless wages so transferred are sufficient to establish a valid Iowa claim, and such charges shall not exceed the amount that would have been charged on the basis of a valid Iowa claim. However, an employer who is required by law or by election to reimburse the trust fund will be liable for charges against the employer's account for benefits paid by another state as required in Iowa Code section 96.8(5), regardless of whether the Iowa wages so transferred are sufficient or insufficient to establish a valid Iowa claim. Benefit payments shall be made in accordance with the claimant's eligibility under the paying state's law. Charges shall be assessed to the employer which are based on benefit payments made by the paying state.

The employer's account is chargeable based upon this separation.

**DECISION:**

The representative's August 9, 2019, decision (reference 01) is affirmed. Under Iowa law the claimant would be allowed benefits, provided he is otherwise eligible. The employer is not relieved of charges.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

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