

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CORY R SANDE**  
Claimant

**APPEAL NO. 12A-UI-00669-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**  
Employer

**OC: 12/11/11**  
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the January 9, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 15, 2012. Claimant Cory Sande participated personally and was represented by Attorney Nathan Russell. Assistant Manager Lisa Kuennen represented the employer. Dewayne Stuve was also on the conference call for the employer.

When the employer representative learned that Mr. Sande's attorney would be participating in the hearing, the employer representative requested postponement of the hearing so that the employer could secure an attorney for the hearing. The hearing notice mailed to the parties on January 26, 2012, had advised both parties of the right to have legal representation at the hearing. The claimant attorney had participated in the fact-finding interview and the employer otherwise had knowledge prior to the hearing that the claimant was represented by an attorney. The employer waited until the time of the hearing to see whether the claimant would appear with legal representation before the employer asserted a need to obtain legal counsel. The employer's inaction prior to the hearing did not provide good cause for postponement of the hearing. When the employer's postponement request was denied for lack of good cause shown, the employer representative and the additional witness waived their personal presence and the employer's presence at the hearing.

In light of the employer's waiver of presence, the administrative law judge proposed to claimant's counsel that a decision be entered based on the information provided at the fact-finding interview. Claimant's counsel acquiesced in a decision based on the record and the appeal hearing record then closed.

**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: Cory Sande was employed by Wal-Mart as a full-time mechanic from 2009 until December 10, 2011, when Assistant Manager Lisa Kuennen discharged for alleged theft of services. On December 8, 2011, Mr. Sande had vacuumed a friend's car while a coworker performed the oil change on the car. Mr. Sande was in possession of the friend's car and was the person responsible for paying Wal-Mart for the oil change. Mr. Sande prepared the appropriate paperwork for the transaction. Mr. Sande had to leave work early for a medical appointment and forgot to pay for the oil change service. The next morning when Mr. Sande arrived for work, he paid for the oil change service. The employer deemed the failure to pay at the time of the service a theft of services and discharged Mr. Sande the next day.

## **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 employer waived its presence at the hearing and thereby failed to present any evidence to meet its burden of proving misconduct in connection with the employment by a preponderance of the evidence. The evidence in the record establishes an isolated incident of carelessness or negligence, but not an intent to steal services from the employer. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Sande was discharged for no disqualifying reason. Accordingly, Mr. Sande is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Sande.

**DECISION:**

The Agency representative's January 9, 2012, 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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