

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DANIEL G FOX
Claimant

APPEAL NO. 17A-UI-09332-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 07/30/17
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Wal-Mart Stores (employer) appealed a representative's August 30, 2017, decision (reference 01) that concluded Daniel Fox (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for September 28, 2017. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer participated by Tara Stoudt, Assistant Store Manager, and Margaret Neilson, Personnel Coordinator. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

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 on April 14, 2015, as a full-time customer service manager. He received the employer's Coaching for Improvement Policy on April 14, 2015. It states, "If your unacceptable job performance or conduct warrants a level of coaching and you have already received a Third Written level of coaching within the previous 12 months, you will be subject to termination." The policy also states, "If you receive a level of coaching and your job performance or conduct remains unacceptable, we may terminate your employment."

The employer did not issue the claimant any written warnings until January 1, 2017. The employer issued him a written warning for unapproved overtime. On May 18, 2017, the employer issued him a written warning for making inappropriate statements. On June 25, 2017, the employer issued him a written warning for closing registers too early. The employer notified the claimant each time that further infractions could result in termination from employment.

The claimant worked at the customer service desk from 2:00 p.m. to 11:00 p.m. During most week nights he worked alone after 7:00 p.m. Among other duties he was told to complete twenty-five weekly audits. He was not told he would be terminated if the audits were not

finished. To execute the audits he used a Tellermate machine. The machine at the customer service desk was used by the other two customer service manager's until 7:00 p.m. After 7:00 p.m. the claimant had access to the Tellermate machine at the desk and solely performed the duties of the customer service manager. He was unable to perform twenty-five audits per week because there were too many duties, not enough training, and he did not have easy access to a Tellermate machine earlier in the day. On July 12, 2017, the employer terminated the claimant. Failure to perform the required weekly audits and "inability to perform job" were the only reasons listed on the exit interview for the termination.

The claimant filed for unemployment insurance benefits with an effective date of July 30, 2017. The employer provided the name and number of Jean Pfeiffer as the person who would participate in the fact-finding interview on August 25, 2017. The fact finder called Ms. Pfeiffer but she was not available. The fact finder left a voice message with the fact finder's name, number, and the employer's appeal rights. Ms. Pfeiffer did not respond to the message. The employer provided some documents for the fact finding interview. Ms. Pfeiffer was not available to rebut the claimant's statement. Ms. Neilson's name was not submitted for the fact-finding interview. She called the fact finder three times on August 25, 2017. The fact finder did not return her call.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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 grounds for discharge listed under a contract of hire are irrelevant to determination of eligibility for Job Service benefits in a misconduct situation. *Hurtado v. Iowa Department of Job Service*, 393 N.W.2d 309 (Iowa 1986). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The employer argues that the claimant was not discharged for not performing the audits but for conduct warranting a level of coaching after having received a third warning. The employer may terminate employees for any reason but the employee may be eligible to receive unemployment insurance benefits.

Misconduct connotes volition. A failure in job performance which results from inability or incapacity is not volitional and therefore not misconduct. *Huntoon v. Iowa Department of Job Services*, 275 N.W.2d 445 (Iowa 1979). 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). The final incident was for the claimant's poor audit performance and the employer has the burden of proof to show evidence of intent. The employer did not provide any evidence of intent at the hearing. The claimant's poor work performance was a result of his lack of training, equipment, time, or a combination of those things. Consequently the employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's August 30, 2017, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs