IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

PAUL B HEABERLIN
Claimant

WAL-MART STORES INC
Employer

APPEAL NO. 16A-UI-11287-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/11/16
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 October 6, 2016, decision (reference 01) that concluded Paul Heaberlin (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 November 2, 2016. The claimant participated personally. The employer participated by Jennifer Nefzger, Asset Protection Manager. 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 November 18, 1991, and at the end of his employment he was working as a full-time department manager of housewares, furniture and storage. The claimant signed for receipt of the employer's policies when he was hired. The employer issued the claimant some warnings earlier in his employment that had expired. On December 10, 2015, the employer issued the claimant a written warning for performance. The employer notified the claimant that further infractions could result in termination from employment. On March 2, 2016, the employer issued the claimant a written warning for performance. The employer notified the claimant that further infractions would result in termination from employment.

The claimant held different positions with company in the nearly twenty-five years he worked for the employer. He had been working in the office for two years when he went back to managing departments for the employer on March 19, 2016. The employer did not give him any training on the processes and forms that had changed in his time away from management. On April 29, 2016, the employer evaluated the claimant and found that he needed improvement but did not give him any training.

The store manager rarely spoke to the claimant and seemed to have a personality conflict with him. Often the claimant was pulled away from his regular duties to help with freight from the night before, help in other departments, and perform general other duties. On September 15, 2016, the employer terminated the claimant for not completing shelf availability reports, not scanning items in bins, and not picking items. The claimant was regularly scanning and picking. His reports were complete but not printed.

The claimant filed for unemployment insurance benefits with an effective date of September 11, 2016. The employer did not participate effectively in the fact finding interview on October 5, 2016. The employer provided the name of Ryan Flanery as the person who would participate in the fact-finding interview. The fact finder called Ryan Flanery but he was not available. The fact finder left a voice message with the employer's appeal rights. The employer did not respond to the message. The employer provided documents in lieu of personal participation in the fact finding interview. The employer did not identify the dates and particular circumstances that caused the separation. The employer did not submit the specific rule or policy that the claimant violated which caused the separation.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code § 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.

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).

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). 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 employer discharged the claimant for poor work performance and 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.

If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony but chose to provide a statement. The statements do not carry as much weight as live testimony because the testimony is under oath and the witness can be questioned. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's October 6, 2016, 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