

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

RICHARD D COLON
50 AMBER LN
IOWA CITY IA 52240

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

Appeal Number: 06A-UI-00844-RT
OC: 12-26-04 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

The employer, Wal-Mart Stores, Inc., filed a timely appeal from an unemployment insurance decision dated January 12, 2006, reference 06, allowing unemployment insurance benefits to the claimant, Richard D. Colon. After due notice was issued, a telephone hearing was held on February 8, 2006, with the claimant participating. The employer did not participate in the hearing because the employer did not call in a telephone number, either before the hearing or during the hearing, where any witnesses could be reached for the hearing, as instructed in the Notice of Appeal. The employer is represented by TALX UC eXpress for the purposes of unemployment insurance benefits and that representative is well aware of the need to call in a telephone number in advance of the hearing if the employer wants to participate in the hearing.

The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a part-time receiving associate from May of 2004 until he was discharged on December 22, 2005. The claimant averaged between 20 and 25 hours per week. The claimant was not initially told why he was discharged but eventually he was told that he was discharged for falsification of his application of hire. When the claimant was hired in May of 2004 he completed an application and answered "no" to the question that asked if he had ever been convicted of theft or fraud. At that time, the claimant forgot about a conviction he had for theft in 1994, which was misdemeanor theft. The claimant was not sent to jail but merely paid a fine. At the time of his application at the employer he forgot about this conviction. At the time of his application process a background check was run on the claimant and nothing came up on his background check. Right before his discharge the employer ran a random background check and noted the 1994 conviction for theft and discharged the claimant for allegedly falsifying his application for hire. The claimant had worked for the employer for almost two years without any problems. Pursuant to his claim for unemployment insurance benefits filed effective in a prior benefit year beginning December 26, 2004, and reopened in that benefit year effective December 18, 2005, the claimant received unemployment insurance benefits in the amount of \$267.00 for benefit week ending December 24, 2005. The claimant opened a new benefit year claim effective December 25, 2005, and received an additional amount of unemployment insurance benefits in the amount of \$883.00 as follows: \$398.00 for two weeks, benefit weeks ending December 31, 2005 and January 7, 2006; zero benefits for benefit week ending January 14, 2006 (earnings \$420.00); and \$87.00 for benefit week ending January 21, 2006 (earnings \$410.00). The claimant received total benefits in the amount of \$1,150.00 since separating from the employer herein.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

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).

871 IAC 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.

871 IAC 24.32(6) provides:

(6) False work application. When a willfully and deliberately false statement is made on an Application for Work form, and this willful and deliberate falsification does or could result in endangering the health, safety or morals of the applicant or others, or result in exposing the employer to legal liabilities or penalties, or result in placing the employer in jeopardy, such falsification shall be an act of misconduct in connection with the employer.

The claimant credibly testified, and the administrative law judge concludes, that he was discharged on December 22, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for a current act of disqualifying misconduct. It is well established that the employer has the burden to prove a current act of disqualifying misconduct. See Iowa Code section 96.6 (2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for a current act of disqualifying misconduct. The employer did not participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of his duties and/or evincing a willful or wanton disregard of the

employer's interests and/or in carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct.

The claimant testified credibly that he was discharged for failing to note on his application of hire in May of 2004 that he had a conviction for theft. In 1994 the claimant had been convicted of misdemeanor theft and paid a fine but was not incarcerated. When the claimant filled out his application for employment with the employer herein ten years later, the claimant simply forgot about that conviction. The claimant did answer that he had not been convicted of theft or fraud. A background check was run on the claimant at the time and nothing came up. Right before the claimant's discharge the employer ran a random background check on employees and the claimant's conviction came to light and the claimant was discharged. The administrative law judge concludes that there is not a preponderance of the evidence that the claimant willfully and deliberately made a false statement on his application of work. The claimant credibly testified that he forgot about this conviction because it was ten years old. Further, the employer did not participate in the hearing and provide evidence that such a false statement would result in endangering the health, safety, or morals of the applicant or others or result in exposing the employer to legal liabilities or penalties or result in placing the employer in jeopardy. Finally, the employer did not participate in the hearing and provide evidence that the claimant's alleged false statement was material. In Larson v. Employment Appeal Board, 474 N.W.2d 570 (Iowa 1991), the Iowa Supreme Court held that a misrepresentation on a job application must be materially related to the job performance to disqualify a claimant from receiving unemployment insurance benefits. The employer did not participate in the hearing and provide evidence as to how the claimant's falsification was materially related to his job performance. Accordingly, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant willfully and deliberately falsified an application of hire in such a manner that he should be disqualified to receive unemployment insurance benefits. In addition, even should the claimant's acts be considered disqualifying misconduct, the administrative law judge is constrained to conclude that the act occurred almost two years before the claimant's discharge and the act would be past conduct. A discharge for misconduct cannot be based on past acts. It is true that past acts and warnings can be used to determine the magnitude of a current act of misconduct but there is no evidence here of a current act of misconduct.

In summary, and for all of the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for a current act of disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided he is otherwise eligible.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,150.00 since separating from the employer herein on or about December 22, 2005, and filing for such benefits effective December 18, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of January 12, 2006, reference 06, is affirmed. The claimant, Richard D. Colon, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

kkf/kjw