

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

KHRISTAL L MERCK
Claimant

APPEAL NO. 18A-UI-10702-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WALMART INC
Employer

OC: 09/23/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Khrystal Merck filed a timely appeal from the October 25, 2018, reference 02, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Ms. Merck was discharged for violation of a known company rule. After due notice was issued, a hearing was held on November 9, 2018. Ms. Merck participated. The employer did not participate in the hearing. The employer received appropriate notice of the hearing, but did not register a telephone number for the hearing. The employer made an untimely request that the appeal hearing be postponed, but failed to provide good cause for postponement of the hearing or for the untimeliness of the postponement request. The administrative law judge denied the employer's request to postpone the appeal hearing and did so based on the untimeliness of the request, the lack of good cause shown, and the impact on the claimant. The hearing in this matter was consolidated with the hearing in Appeal Number 18A-UI-10703-JTT. Exhibit A was received into evidence. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to the claimant (DBRO).

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: Khrystal Merck was employed by Walmart, Inc. as a full-time Customer Service Manager (CSM) until September 27, 2018, when the employer discharged her for assisting a customer in sending money transfers. Ms. Merck did not know that the customer's actions were part of a scam. Ms. Merck facilitated a series of transactions on behalf of the customer. On 10 occasions, the customer asserted that she was unable to send the money transfers in the customer's name. On those occasions, Ms. Merck acquiesced in allowing the customer to use her name when sending the money transfers. Ms. Merck acted under the belief that she was merely providing good customer service by assisting the customer. Ms. Merck had most recently assisted in such a manner in August 2018. On September 27, 2018, a Walmart asset protection agent

interviewed Ms. Merck regarding the money transfers she had handled for the particular customer and discharged her from the employment.

REASONING AND CONCLUSIONS OF LAW:

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).

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).

The evidence in the record establishes a discharge on September 27, 2018, but fails to establish that the discharge was based on misconduct in connection with the employment. The employer did not participate in the hearing and did not present any evidence to meet its burden of proving a discharge based on a current act of misconduct in connection with the employment. The evidence in the record establishes that Ms. Merck assisted a customer in good faith performance of her work duties and in so doing unwittingly facilitated fraudulent money transfers. The evidence fails to establish any intent on the part of Ms. Merck to act contrary to the interests of the employer. The evidence also fails to establish when the employer learned of the issue that led to September 27, 2018 discharge, and thereby fails to establish a current act basis for the discharge. Because the evidence establishes a discharge for no disqualifying reason, Ms. Merck is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The October 25, 2018, reference 02, decision is reversed. The claimant was discharged on September 27, 2018 for no disqualifying reason. The claimant is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs