IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

GARY D JACKSON
Claimant

WAL-MART STORES INC
Employer

APPEAL NO. 18A-UI-00647-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/17/17
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Gary Jackson (claimant) appealed a representative's January 8, 2018, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with Wal-Mart Stores (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for February 6, 2018. The claimant participated personally. The employer participated by Christopher Lundquist, Grocery Consumable Compliance Manager.

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 June 20, 2013, as a full-time member/greeter. The employer had an online handbook. It requires employees to complete computer based learning of its policies. The employer states that everyone should be treated fairly so long as the conduct does not interfere with the legitimate interests of Wal-Mart or other individuals. The employer is not sure when the claimant received this policy.

The employer prepared three written warnings about respect for the individual. The claimant entered his password on May 28, 2016, November 29, 2016, and February 5, 2017. In doing so, the employer could put a copy of the warnings in his file. The employer did not give the claimant copies of the warnings. One of the warnings was issued to the claimant after a customer told the employer something untrue about what the claimant said. The employer notified the claimant that further infractions could result in termination from employment.

On December 9, 2017, Supervisor Niles was driving at excessive speed and almost hit the claimant in the parking lot. After he parked his car, the claimant told Supervisor Anthony about the situation. Supervisor Anthony told the claimant, "I'll hold him down so you can hit him in the face". The claimant clocked in and proceeded to his work duties. On his way he saw Supervisor Niles. The claimant said, "You were driving way too fast for the parking lot".

Supervisor Niles told the claimant how the near miss was completely the claimant's fault. The claimant said, "You were driving like an idiot" and walked away. Supervisor Niles said he was not done talking to the claimant. The claimant said he was going to work. Neither Supervisor Niles nor Supervisor Anthony were the claimant's supervisors. Supervisor Niles continues to work for the employer.

The employer investigated the situation on December 9, 2017, and questioned witnesses. The employer did not question the claimant or Supervisor Anthony. The claimant continued to work through December 20, 2017. On December 20, 2017, the employer terminated the claimant.

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 employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident provided by the employer occurred on December 9, 2017. The claimant was not discharged until December 20, 2017. The final incident and the discharge are too remote. The employer has failed to provide any evidence of willful and deliberate misconduct which was the final incident leading to the discharge and disqualification may not be imposed.

The claimant's and the employer's testimony is inconsistent. The administrative law judge finds the claimant's testimony to be more credible because he was an eye witnesses to the events for which he was terminated. The employer did not provide witnesses or statements.

DECISION:

The representative's January 8, 2018, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs