

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

LISA SCHULTE
125 E BOYSON RD APT 310
HIAWATHA IA 52233-1251

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

Appeal Number: 06A-UI-07700-JTT
OC: 07/02/06 R: 03
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Lisa Schulte filed a timely appeal from the July 24, 20076, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 16, 2006. Ms. Schulte participated. The employer did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. In deciding this matter, the administrative law judge has taken official notice of court records made available to the public at the Iowa Judicial Branch's official website located at www.judicial.state.ia.us.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Lisa Schulte was employed by Wal-Mart as a full-time cashier from February 18, 2003 until July 5,

2006, when Customer Service Manager Danny Hoppes and an Assistant Store Manager, Jeff, discharged her.

The final incident that prompted the discharge occurred on July 5, 2006 and concerned an alleged sale of alcohol to a person under the legal age to possess alcohol. The customer in question was in Ms. Schulte's checkout lane at approximately 5:00 p.m. The checkout lanes were busy. Ms. Schulte was working in the express lane. There were six customers waiting behind the customer in question. Ms. Schulte had commenced her shift at 11:00 a.m., was to finish her shift at 8:00 p.m., and was overdue for her break. Ms. Schulte believed the customer appeared to be 21 years old. The customer presented an I.D., which Ms. Schulte reviewed and compared to the customer. Ms. Schulte noted the birth date. Ordinarily, Ms. Schulte would enter the customer's birth date information in response to a cash register prompt after scanning the alcohol item. The cash register would then compute the customer's age. However, Ms. Schulte had erroneously punched a key that totaled the purchase. At that point, Ms. Schulte could not get back to the birthday information screen without the assistance of a member of management. Ms. Schulte was mindful of the six customers waiting in her lane and was mindful of the fact that it could take five minutes for a manager to respond to her register if she used her register light to summon a manager. Ms. Schulte tried to compute the customer's age in her head, but felt under stress, and could not figure out the customer's exact age. Ms. Schulte completed the transaction and allowed the customer to purchase alcohol.

When Ms. Schulte was instructed it was time for her break she was also instructed to go to the customer service manager's podium. A police officer was waiting at the podium. The police officer asserted that Ms. Schulte had sold alcohol to a person under the legal age who had been assisting with a police sting. Ms. Schulte was directed to an office at the back of the store, where she met with the police officer, Customer Service Manager Danny Hoppes and an Assistant Store Manager, Jeff. The officer issued Ms. Schulte a citation. After the officer departed, the managers told Ms. Schulte that she was discharged from the employment. Ms. Schulte had participated in a Wal-Mart's computer based training course regarding the sale of alcohol and had received training in operating the cash register. Ms. Schulte had not received prior reprimands for similar conduct.

Clerk of District Court records maintained at the Iowa Judicial Branch's official website bear no indication that Ms. Schulte has been charged with, pleaded guilty to, or been convicted of an indictable offense in connection with the July 5, 2006 incident.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Schulte was discharged for misconduct in connection with the employment. It does 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).

Iowa Code section 96.5-2-c 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:

c. Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act. Determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith.

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).

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). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The employer did not participate in the hearing and, accordingly, has failed to present any evidence whatsoever to corroborate and/or substantiate the allegation of misconduct. See 871 IAC 24.32(1)(a). The evidence in the record indicates that on July 5, 2006, Ms. Schulte neglected to properly determine the age of a customer who purchased alcohol. The evidence indicates that Ms. Schulte lacked sufficient math skills to compute the customer's age without the assistance of the cash register prompt she was accustomed to using. Because Ms. Schulte had mistakenly bypassed that prompt and because the cash register would not allow Ms. Schulte to returned to the bypassed prompt, Ms. Schulte had to make a decision whether to allow the sale or to summon a manager. Ms. Schulte believed the person before her was probably 21 years old. Ms. Schulte considered the number of customers waiting in her lane and the likely wait for a manager to come to her assistance. Ms. Schulte decided that continuing to move customers through the checkout lane in a timely fashion outweighed the need to be accurate in ascertaining the age of the customer wanting to purchase alcohol. The situation called upon Ms. Schulte to weigh these competing interests of the employer and Ms. Schulte made the wrong decision. Though the evidence establishes poor judgment rising to the level of negligence, it does not establish willful or deliberate disregard of the employer's interests. See 871 IAC 24.32(1)(a). See also Richers v. Iowa Department of Job Service, 479 N.W.2d 308 (Iowa 1991). The evidence demonstrates no other incidents of negligence.

The evidence in the record fails to establish gross misconduct. The administrative law judge has reviewed Clerk of District Court records maintained at the Iowa Judicial Branch's official website. Those records fail to indicate a charge, guilty plea, or conviction for an indictable offense. See Iowa Code section 96.5(2)(b) and (c).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Schulte was discharged for no disqualifying reason. Accordingly, Ms. Schulte is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Schulte.

DECISION:

The Agency representative's July 24, 20076, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

jt/pjs