

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

THOMAS G FALK
Claimant

APPEAL NO. 11A-UI-04498-JT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

**OC: 02/27/11
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Thomas Falk filed a timely appeal from the April 1, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 12, 2011. Mr. Falk participated. Jeremy McDowell represented the employer and presented additional testimony through Jess Wilkinson. Exhibits One through Six and A were received into evidence.

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: Thomas Falk was employed by Sam's Club in Windsor Heights until March 5, 2011, when he was discharged for theft of company property. From October 2010 until the discharge, Mr. Falk worked as a full-time meat wrapper. On March 4, 2011, Mr. Falk removed two rotisserie cooked chickens from the store without paying for them in violation of the employer's established work rules. The employer had work rules that prohibited "grazing" and that required employees pay for all merchandise. The employer also had an ethics policy that obligated Mr. Falk to ask for guidance if he found himself in a situation where he was not sure what was allowable or appropriate. Mr. Falk was aware of the work rules. At the end of the shift, any leftover rotisserie chicken was to be placed into a blast freezer unless the blast freezer was full. If the blast freezer was full, the chicken was to be placed in a "bone barrel" so that it could be sold to a rendering company for use as animal feed. Mr. Falk was aware of the appropriate protocol for handling the left-over rotisserie chicken at the end of the shift. On March 4, Mr. Falk decided to take two rotisserie chickens home with him instead of placing them in the bone barrel for further sale. Mr. Falk knew the conduct was not authorized under the employer's work rules and suspected he might face discipline for the conduct. Mr. Falk did not count on the employer treating the matter as a dischargeable offense. Mr. Falk exited the store with the chicken. As he did so, he had to stop and visit with the door person, whose job it was to make certain that any merchandise that left the store appeared on an appropriate receipt. When the door person asked Mr. Falk about the chicken, Mr. Falk explained his reason for taking the chicken without

paying for it and then exited the store. The door person was neither a security officer nor a supervisor. Mr. Falk knew this. The door person immediately reported the incident to a manager. The manager followed up with Mr. Falk the next day. Ms. Falk admitted to taking the chicken and admitted to knowing at the time that it was contrary to the employer's policies.

REASONING AND CONCLUSIONS OF LAW:

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.

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). 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 weight of the evidence establishes that Mr. Falk was discharged for theft. The theft involved taking property that belonged to the employer and converting the employer's property to personal use. Mr. Falk knew at the time of the conduct that his actions were inconsistent with the employer's ownership interest in the property and the employer's express instructions that property be placed in the bone barrel as a source of revenue to the employer. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Falk was discharged for misconduct. Accordingly, Mr. Falk is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Falk.

DECISION:

The Agency representative's April 1, 2011, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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