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

CINDY S POLTON
Claimant

WAL-MART STORES INC
Employer

APPEAL NO. 07A-UI-07649-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/08/07   R: 03
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 30, 2007, reference 01, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on August 27, 2007. Claimant participated with Paul Ladell. Employer participated through Lori McDermott and Cindy Fangman. Employer's Exhibits 1 through 4 were received.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time bakery associate from December 12, 2006 until May 7, 2007, when she was discharged. On April 14 claimant was allegedly arguing with a coworker in the bakery and was asked to go to the office, where she was allegedly disrespectful to Fangman and McDermott by yelling and refusing to lower her voice to the extent that Greg, another member of management, entered to ask what was going on. She explained to employer she had congestion that made it more difficult for her to tell how loud her voice is or to hear others well. On May 7 claimant wore blue jeans to work and was told she was fired because of that issue. The dress code enforcement deadline was not until June 18.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code § 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.

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.

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 issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. Inasmuch as the dress code policy enforcement date had not yet passed and employer had not previously warned claimant about any of the issues leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or negligently in violation of company policy or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written) and reasonable notice should be given. Furthermore, employer waited three weeks after the April 14 incident to fire claimant, and thus, has not established a current or final act of misconduct. Without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

DECISION:

The July 30, 2007, reference 01, decision is affirmed. The claimant was discharged from employment for no current disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/kjw