

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TONY E NERISON
Claimant

APPEAL NO: 12A-UI-11863-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 09/02/12

Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc. (employer) appealed a representative's September 19, 2012 decision (reference 01) that concluded Tony E. Nerison (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 29, 2012. The claimant participated in the hearing. Elena Rocha appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on October 16, 2006. Since about the fall of 2010 he worked full time as service support manager in the automotive department at the employer's Dubuque, Iowa store. His last day of work was September 2, 2012. The employer discharged him on that date. The reason asserted for the discharge was doing work on his own vehicle in violation of the employer's policies.

Some months prior to August 9 the claimant had purchased tires from the employer; with the purchase, he was entitled to have the tires mounted with no installation charge. He did not have the tires mounted at that time as his current tires were not yet in need of being changed out. On August 9 he brought his vehicle and the tires into the service shop. He initially wrote up the work order for installation of the tires himself, drove the vehicle into the service bay, and then vacuumed out the vehicle. He then cancelled the work order. The claimant technically should not have written up the ticket himself, driven the car into the bay, or vacuumed out the vehicle.

The claimant acknowledged that he had previously been aware of the policy against doing these things, but indicated that on August 9 business was slow and he did these things to keep busy, not remembering the policy at the time. However, another associate reported the activity to management either that same day or the next day, August 10.

The employer did not make any mention of the incident to the claimant until it discharged him on September 2. The employer indicated that the delay was because an asset protection representative was not available to conduct the investigation, and that is not the employer's policy to inform an employee of a pending investigation. Because of the conclusion that the claimant had violated the policy, the employer discharged the claimant. No other prior disciplinary action was considered in making the employer's decision to discharge the claimant.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The gravity of the incident and the number of prior violations or prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

The reason cited by the employer for discharging the claimant is his work on his own vehicle on August 9. Under the circumstances of this case, the claimant's work on his vehicle that day was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits. Further, even if the activity did rise to the level of

misconduct, there is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); *Greene v. Employment Appeal Board*, 426 N.W.2d 659 (Iowa App. 1988). The incident in question occurred over four weeks prior to the employer's discharge of the claimant, and there was no timely notice to the claimant of the pending investigation in order to retain the required currency. *Greene*, supra. Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The representative's September 19, 2012 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css