

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

CHRISTINA M DYSON
Claimant

APPEAL NO. 18A-UI-01959-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 12/31/17
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Christina Dyson filed a timely appeal from the February 7, 2018, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau Deputy's conclusion that Ms. Dyson was discharged on December 28, 2017 for violation of a known company rule. After due notice was issued, a hearing was held on March 9, 2018. The hearing in this matter was consolidated with the hearing in Appeal Number 18A-UI-01960-JTT. Ms. Dyson participated. Olivia Robbins represented the employer. Exhibits 1, 3 and 4 were received into evidence.

ISSUE:

Whether Ms. Dyson was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Christina Dyson was employed by Wal-Mart Stores, Inc. as a full-time sales associate from 2015 until December 28, 2017, when Co-Manager John Wilson discharged her from the employment for having three written reprimands within one year. Ms. Dyson began her employment at the Wal-Mart store in Iowa City. In June 2016, Ms. Dyson transferred her employment to the Coralville Wal-Mart store. Toward the end of the employment, Ms. Dyson worked as an Electronics Sales Associate. Earlier in the employment, Ms. Dyson worked in other areas of the store including the photo lab. The electronics area and the photo lab are adjacent departments and are located at the back of the store, near the managers' office.

The final incident that gave rise to Ms. Dyson's third "coaching" within a year, and that triggered the discharge, concerned Ms. Dyson's interaction with a photo lab sales associate, Anne Covington, on December 28, 2017. On the day before this incident, Ms. Covington needed some keys that Ms. Dyson had in her hand. When Ms. Dyson offered the keys to Ms. Covington, Ms. Covington aggressively grabbed the keys from Ms. Dyson's hand. Ms. Dyson reported the incident to Front End Supervisor Laura Huff. Ms. Huff was an hourly employee, rather than a salaried member of management. Under the employer's work rules, an

employee who has an issue with a coworker is supposed to report the matter to a salaried member of management. Ms. Dyson was under the erroneous belief that Ms. Huff was a salaried member of management.

On December 28, Co-Manager John Wilson asked Ms. Dyson to assist a customer with getting photos from the photo lab. The customer was an off-duty Coralville Wal-Mart pharmacist, Julie Iverson. As Ms. Dyson was getting the photos for Ms. Iverson and had the photos in her hand, Ms. Covington aggressively grabbed the photos from Ms. Dyson's hand. Ms. Dyson told Ms. Covington she was rude and demanded to know why Ms. Covington was "constantly snatching stuff" out of her hand. Ms. Dyson perceived Ms. Covington's actions to be based on Ms. Dyson's ethnicity. Ms. Dyson is African-American. A heated exchange between Ms. Dyson and Ms. Covington followed while Ms. Iverson stood by. During the exchange, Ms. Covington said she was "tired of this shit," took off her work jacket, threw it on the floor, and said she was going home early. Co-Manager John Wilson heard the ruckus from the managers' office and arrived to deescalate the situation. Mr. Wilson interviewed Ms. Dyson, Ms. Covington and Ms. Iverson. Ms. Dyson and Ms. Covington each asserted the other had been the primary verbal aggressor. Ms. Iverson provided a statement that supported Ms. Covington's version of events. Ms. Covington had previously worked as a clerk in the pharmacy and was on familiar, friendly terms with Ms. Iverson. Mr. Wilson deemed Ms. Dyson to have violated the employer's policy regarding respectful conduct. Because Ms. Wilson had two previous coachings within the preceding year, Mr. Wilson discharged Ms. Dyson from the employment. Assistant Olivia Robbins was present when Mr. Wilson notified Ms. Dyson she was discharged from the employment. During the meeting, Ms. Dyson asked the employer to speak with Ms. Huff regarding the complaint Ms. Dyson had made to Ms. Huff about Ms. Covington on December 27. The employer declined to follow up with Ms. Huff.

The next most recent incident that factored in the discharge was a verbal exchange on the sales floor between Ms. Dyson and Electronics Sales Associate Patricia Meredith on September 15, 2017. On that day, Ms. Dyson returned from her lunch break to find that Ms. Meredith had not processed any of the awaiting freight while Ms. Dyson had been on her lunch break. Ms. Dyson asked Ms. Meredith why she had not done any work while Ms. Dyson had been on break. During the exchange, Ms. Meredith stated, "I ain't doing shit." Co-Manager Jesse Spors issued a written coaching to both employees on September 15. In Ms. Dyson's coaching, Mr. Spors wrote, "Christina is expected to be respectful at all times and use the open door policy when an associate is being disrespectful with her instead of having an altercation on the sales floor." After the September 15 verbal exchange, Ms. Dyson and Ms. Meredith continued to work together in the electronics department without further incident until the end of Ms. Dyson's employment.

The earliest incident and coaching that factored in the discharge concerned theft of a \$700.00 Apple iPad on March 8, 2017. The store's practice and policy was to secure such items in a locked back room, rather than to display such items on the sales floor. If a customer desired to purchase such items, the employee was to retrieve the item from the secured area and immediately ring up the transaction. Ms. Dyson was familiar with the policy. On March 8, 2017, a customer requested the iPad and Ms. Dyson collected the iPad from the secured area. The customer then declined to purchase the iPad at that moment. Rather than returning the iPad to the secured area of the back room per protocol, Ms. Dyson put the iPad on the counter next to the cash register. Another sales associate was present at the time Ms. Dyson placed the iPad by the register. Ms. Dyson then left the area. Shortly thereafter the other sales associate left the area. The purported customer then took the iPad, concealed it on his person, and left the store without paying for the iPad.

REASONING AND CONCLUSIONS OF LAW:

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).

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 evidence in the record establishes legitimate employer concerns about Ms. Dyson's conduct at work, but does not establish a substantial and intentional disregard of the employer's interests. The administrative law judge notes that the employer did not present testimony from Ms. Covington, Ms. Iverson, or Mr. Wilson, the people with firsthand personal knowledge of the incident that triggered the discharge. The weight of the evidence establishes that Ms. Dyson made an error in judgment by confronting Ms. Covington on the sales floor, rather than taking the concern to a salaried manager. During the appeal hearing, the administrative law judge noted that Ms. Dyson's general manner of speaking is brisk and animated. A reasonable person could easily perceive Ms. Dyson's speech as excited, upset and/or aggressive in the absence of any such intent on the part of Ms. Dyson. While the administrative law judge can understand the employer's desire to eliminate any and all interpersonal conflict from the sales floor to ensure customers have a pleasant shopping experience, occasional moments of friction are inevitable amongst coworkers. Ms. Dyson's conduct on December 28 did not rise to the level of misconduct in connection with the employment and would not disqualify her for unemployment insurance benefits. The employer concedes that the December 28 conduct would not have prompted a discharge from the employment absent the earlier coachings. The employer presented insufficient evidence, and insufficiently direct and satisfactory evidence, to establish misconduct on September 15 in connection with Ms. Dyson's concern that Ms. Meredith was not pulling her weight. The employer presented no testimony from persons with personal knowledge of that incident. The evidence does establish that Ms. Dyson was careless in leaving the iPad unsecured on March 8, but the evidence indicates that the carelessness was an isolated instance, rather than part of a pattern of carelessness and/or negligence.

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

DECISION:

The February 7, 2018, reference 01, decision is reversed. The claimant was discharged on December 28, 2017 for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs