

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ERIC A GAUL
Claimant

APPEAL NO. 06A-UI-11740-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 11/05/06 R: 04
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Wal-Mart Stores filed a timely appeal from the November 28, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 21, 2006. Claimant Eric Gaul participated. Assistant Manager Ben Utoft represented the employer. Employer's Exhibits One through Nine 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. He was not.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Eric Gaul was employed by Wal-Mart Stores as a part-time service technician from December 3, 2005 until November 1, 2006, when Assistant Manager Ben Utoft discharged him. The discharge was based on a \$25.15 check Mr. Gaul's girlfriend had written at the Wal-Mart on March 19, 2006. Mr. Gaul was dating, but not living with, the girlfriend at the time she wrote the check. Mr. Gaul allowed the girlfriend to use his associate discount card in connection with the transaction, saving the girlfriend 10 percent, or \$2.71. Mr. Gaul was outside in a car at the time the girlfriend wrote the check. Mr. Gaul did not know the girlfriend was going to pay with a check or that the girlfriend had insufficient funds in her checking account to cover the check. Mr. Gaul gained no benefit from the items the girlfriend obtained with the check. On April 16, 2006, the employer disciplined Mr. Gaul for allowing a non-family member to use his associate discount. The employer told Mr. Gaul that because the purchase involved use of his discount card, he was liable for the face amount of the check and a substantial returned check fee. The employer had both a discount card use policy and a "returned associate checks" policy. However, neither written policy notified Mr. Gaul that he would be liable under the circumstances at issue. The employer did not take any steps to collect the funds from the girlfriend who had written the check. The employer made additional demands for compensation, but Mr. Gaul did not pay anything to Wal-Mart in connection with the check. On September 20, the employer issued a reprimand to Mr. Gaul for failing to pay the check, provided him with a "decision-making day" and instructed him to pay the requested amount in a

timely manner. At this point, the requested sum had grown to an amount exceeding \$100.00. On November 1, 2006, when Mr. Gaul had still not paid anything in connection with the check, the employer discharged him. There was no other basis for the discharge.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Gaul 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.

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 that the incident that ultimately prompted the discharge occurred on March 19, 2006 and had come to the employer's attention before April 16, when the employer reprimanded Mr. Gaul for abusing his associate discount card privileges. The unauthorized use of the discount card was the extent of Mr. Gaul's misconduct. Mr. Gaul did not write the check that bounced, did not know the girlfriend was even going to write a check, and did not gain any benefit from the items obtained with the check. Even if the administrative law judge were to consider Mr. Gaul's failure to make payments in connection with the check as misconduct, that conduct would not provide a basis for disqualifying Mr. Gaul for unemployment insurance benefits. First, the conduct was not substantial misconduct. Second, the employer was aware of Mr. Gaul's failure to make payment in connection with the check as of April. The conduct would no longer have constituted a "current act" six months later when the employer made the decision to discharge Mr. Gaul. See 871 IAC 24.32(8). Likewise, the discount card abuse no longer constituted a "current act" at the time of discharge.

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

DECISION:

The Agency representative's November 28, 2006, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw