

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TERESA L HARLAND**  
Claimant

**APPEAL NO. 10A-UI-17052-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**  
Employer

**OC: 11/07/10**  
**Claimant: Respondent (1)**

Section 96.5-2-A – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Employer filed an appeal from a decision of a representative dated December 2, 2010, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on January 24, 2011. Claimant participated. Employer participated by Mark Schneweis, Health and Wellness Market Director. The record consists of the testimony of Mark Schneweis and the testimony of Teresa Harland.

**ISSUE:**

Whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The claimant was employed as the vision center director in the optical department of a Wal-Mart store located in Davenport, Iowa. The claimant was initially hired on April 5, 1999. Her last day of work was November 8, 2010. She was terminated on November 8, 2010.

The incident that led to the claimant's termination occurred on October 20, 2010. A patient asked the claimant to order his contact lens. The claimant explained to the patient that she could not do so because the claimant's doctor had not finalized the prescription. The patient became upset. The claimant offered to give him a trial set of contacts until he was seen by the doctor. The patient calmed down. The supply of trial lens available in the store did not include a lens for one eye that had the patient's exact prescription. The claimant explained to the patient that there was a small variation in one of the lens from the prescription and that he would not see as sharply as he otherwise would. The claimant had followed this procedure in the past as had the doctor who prescribed the lens. There was no written Wal-Mart policy concerning this situation.

Mark Schneweis does not know when he became aware of this situation. He spoke to the claimant on November 8, 2010, and terminated her in the afternoon of that same day. Another employee had done the same thing as the claimant and the claimant had been previously asked

to terminate that employee. The claimant clarified the policy with the doctor after she was told to terminate the other employee and after she had given out the trial lens.

**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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Good faith errors in judgment or discretion are not misconduct. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof to show misconduct.

The claimant was terminated for giving a patient a trial contact lens that did not meet his exact prescription. The claimant testified that both she and the doctor had done this in the past and that there was no Wal-Mart policy that prohibited or even addressed this type of practice. At some unknown point in time, Mr. Schneweis became aware of this practice and ordered the claimant to terminate another employee. He then made the decision to terminate the claimant as well. This decision was based on his conversation with the doctor and a policy that the doctor had about changing prescriptions for trial lens. The claimant had also talked to one of the doctors after she had been told to terminate the claimant and after she had given out the trial lens. The "new" policy was that no changes were to be made without first consulting the doctor.

The administrative law judge concludes that there is insufficient evidence of misconduct in this record. The exact policy on dispensing trial contact lens was vague, to say the least, and the claimant credibly testified that there was no Wal-Mart policy on the matter. The doctor's instructions were also not clear. The employer's concern about dispensing contact lens that did not meet the prescription is certainly justified and a clarification about what should be done was in order. The claimant's actions, absent a clear policy, cannot be deemed misconduct. A claimant is entitled to know what types of conduct will lead to termination before the alleged misconduct takes place.

The administrative law judge also has reservation about whether there was a current act of misconduct. The incorrect lens was given to the patient on October 20, 2010. The claimant was not terminated until November 8, 2010. She worked up until that date. Mr. Schneweis could not recall when he found out about the claimant's actions. Almost three weeks passed between the time of the incident and the claimant's termination.

The employer has not provided sufficient evidence to establish misconduct. Benefits are allowed if the claimant is otherwise eligible.

**DECISION:**

The decision of the representative dated December 2, 2010, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

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