IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

LYNETTE L ROSE
Claimant

WALMART INC
Employer

APPEAL NO. 18A-UI-10102-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/09/18
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Walmart (employer) appealed a representative's September 25, 2018, decision (reference 01) that concluded Lynette Rose (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for October 22, 2018. The claimant participated personally. The employer participated by Monica Snyder, Asset Protection Manager. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on March 14, 2017, as a full-time cashier. She signed for orientation on the employer's policies on March 14, 2017. The claimant was unsure how to find the employer's policies if she had a question. The employer had policies regarding warnings. The employee's supervisor had to require an employee who received a third warning to submit a plan of action. The supervisor was mandated to meet with the employee to discuss and develop the plan. Failure to develop a plan or receipt of a fourth warning within twelve months, would result in termination. One of the policies related to active coaching period stated, "When your supervisor or manager uses a level of coaching to inform you of unacceptable job performance or [illegible] requesting improvement, an active coaching period related to this issue begins and will continue for twelve months."

Cashiers were required to take a six-month training called Pathway Skill Builder. After the claimant spent five days in training, the employer placed the claimant on a cash register. In approximately May 2017, after about two months of training, the employer talked to the claimant about making an inappropriate remark to a customer about another customer's inability to speak

English. On November 18, 2017, the employer told the claimant to allow customers with more than twenty items to go through the checkout line for customers with twenty items of less. The employer did not give the claimant a copy of anything after either discussion. The employer did not warn the claimant of further consequences.

The employer told employees to tell customers to leave heavy items in the cart. A customer put a fifty-two pound bag of dog food on the conveyor belt and the belt had trouble moving. The claimant asked the customer if she would leave the item in the cart next time. The customer complained about the claimant's comment. On January 19, 2018, the employer talked to the claimant about the customer complaint. The employer did not give the claimant a paper indicating what the two discussed. The employer may have warned the claimant about possible termination should she receive another warning.

When a cashier takes a check for payment, the cash register sends a message to the cashier about what to do with the physical check. The cashier should either return the check to the customer or insert it in the cash drawer. This policy is not discussed in the training. On Saturday, September 8, 2018, the asset protection manager learned that the claimant took a check for payment from a customer. She did not place the check written by the customer in the cash drawer, as indicated in a message sent to the claimant by the cash register. She returned the check to the customer. The employer did not receive payment for the transaction. On September 10, 2018, the asset protection manager told the claimant the incident occurred on August 20, 2018, and the amount of the check was $50.00. The Exit Interview papers indicated the event occurred on August 20, 2018. The claimant did not remember this incident.

On September 24, 2018, the asset protection manager told the fact finder that the final event occurred on August 26, 2018, and the amount of the check was $76.25. At the appeal hearing the asset protection manager testified that the incident occurred on August 31, 2018. She did not know the amount of the check but it was in excess of $50.00. Later, the asset protection manager thought August 26, 2018, sounded better.

The claimant filed for unemployment insurance benefits with an effective date of September 9, 2018. The employer participated personally at the fact finding interview on September 24, 2018, by Monica Snyder.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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).

Iowa Admin. Code r.871-24.32(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). Misconduct connotes volition. A failure in job performance which results from inability or incapacity is not volitional and therefore not misconduct. *Huntoon v. Iowa Department of Job Services*, 275 N.W.2d 445 (Iowa 1979). 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). The employer discharged the claimant for poor work performance and has the burden of proof to show evidence of intent. The employer did not provide any evidence of intent at the hearing. If there was poor work performance, it was a result of her lack of training.

The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The employer was not able to provide any evidence of a final incident of misconduct. The claimant has no recollection of such an event and the employer cannot provide a date certain or a dollar amount. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's September 25, 2018, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs