

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

TINA D WRIGHT
2707 W 60TH ST
DAVENPORT IA 53806

WAL-MART STORES INC
C/o FRICK UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-06402-JTT
OC: 05/15/05 R: 04
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(8) – No Current Act

STATEMENT OF THE CASE:

Wal-Mart filed a timely appeal from the June 6, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 6, 2005. Tina Wright participated. Co-Manager Jason Dennis represented Wal-Mart. Exhibits One through Four were received into evidence.

FINDINGS OF FACT:

Tina Wright was employed by Wal-Mart as a full-time customer service manager from September 2002 until May 18, 2005, when Store Manager Dan Cosner discharged her for misconduct based on a violation of Wal-Mart's Alcohol and Drug Abuse policy.

The incident that prompted the discharge occurred in March and came to the attention of Wal-Mart management at the end of March or the beginning of April. On three occasions during March, a coworker, Michelle (no last name provided by the employer), gave Ms. Wright prescription medication, which Ms. Wright took for a migraine headache. The medication had been prescribed to Michelle. Michelle also gave the prescription medication to employees Dick Hill and Lisa Gale. Before the end of March, Michelle advised Mr. Hill that she intended to tell Wal-Mart management that she had given him the prescription medication. Mr. Hill visited with Assistant Manager Amy Garstang and fully disclosed his involvement in the matter. Immediately after the meeting with Ms. Garstang, Mr. Hill went to Ms. Wright's home to advise that he had fully disclosed the matter to Ms. Garstang and to assure Ms. Wright that neither he nor Ms. Wright was going to get in any further trouble regarding the matter. One week after Mr. Hill spoke with Ms. Garstang, Ms. Wright briefly discussed the matter with Co-Manager Jason Dennis. That conversation would have taken place at the beginning of April.

One or two weeks prior to the date Ms. Wright was discharged, "Michelle" visited with Store Manager Dan Cosner about the pill sharing. The following week, Michelle announced to those present in the employee break room that she had gone to the manager about the matter. The Wal-Mart management team reviewed Wal-Mart's Alcohol and Drug Abuse policy and then consulted with the Wal-Mart corporate office before taking further action.

Wal-Mart's written Alcohol and Drug Abuse policy is set forth in the employee handbook and is available for employees to review on the employer's internal computer network. On September 17, 2002, Ms. Wright executed a written acknowledgement of having read the contents of the handbook. Under the Alcohol and Drug Abuse policy, "an associate who consumes a prescription drug that is not prescribed in their name is subject to disciplinary action, up to and including termination."

On May 18, 2005, Store Manager Dan Cosner discharged Mr. Hill based on the pill sharing incidents. During Mr. Cosner's conversations with Mr. Hill, Mr. Hill mentioned Ms. Wright as a person involved in the matter. On the same day, Mr. Cosner interviewed Ms. Wright about her involvement in the matter, and Ms. Wright fully disclosed her involvement. Mr. Cosner then advised Ms. Wright that the corporate office had instructed him to discharge her. The employer did not advise Ms. Wright that her conduct was grounds for dismissal until May 18, 2005.

Co-Manager Jason Dennis describes Ms. Wright as an "excellent worker." Ms. Wright had received no previous warnings or reprimands.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Wright was discharged for misconduct in connection with her employment.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 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). Before the administrative law judge can consider whether an employee was discharged for misconduct that would disqualify the employee for benefits, the evidence in the record must establish the final act that prompted the discharge was a "current act." See 871 IAC 24.32(8). 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 establishes that the incidents upon which Ms. Wright's discharge was based occurred in March. Ms. Wright's coworker brought the matter to the employer's attention in March and Ms. Wright further discussed the matter with the employer a week later. The employer's witness testified that the matter came to the attention of Wal-Mart management within the month prior to Ms. Wright's discharge on May 18. The employer did not provide meaningful testimony regarding the information Mr. Hill had shared with Assistant Manager Amy Garstang when he brought the matter to her attention in March, and whether Ms. Wright's involvement was mentioned at that time. The administrative law judge concludes that the

evidence in the record fails to establish a "current act" of misconduct that might serve as a basis for disqualifying Ms. Wright for benefits.

Based on the evidence in the record and application of the law cited above, the administrative law judge concludes that Ms. Wright was discharged for no disqualifying reason. Accordingly, Ms. Wright is eligible for benefits, provided she is otherwise eligible.

DECISION:

The Agency representative's decision dated June 6, 2005, reference 01, is affirmed. The claimant was discharged from her employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

jt/kjw