

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DANNY N WADKINS
Claimant

APPEAL NO. 12A-UI-10835-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 08/05/12
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from the August 28, 2012 (reference 01) decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call on October 2, 2012. Claimant participated with witness Inventory Management Services Worker Katie Fetty. Employer participated through Shift Manager Crystal Smith and Assistant Manager James Pilcher.

ISSUE:

Was the claimant discharged for reasons related to disqualifying job misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a third shift stocker from April 2001 and was separated from employment on August 10, 2012. On August 3 he climbed on steel shelving to get merchandise down. Asset protection employee Christine Brownson witnessed and reported the incident. There are signs posted every eight feet on the steel shelving not to climb or stand on the steel. Scissor lifts and ladders are available to retrieve merchandise. He had been coached on January 28, 2009 after he cut himself with a box knife by using it improperly.

He used a ladder to help a second shift associate and stepped onto the steel from the ladder. The scissor lift would not extend out to reach the product he was trying to move. The railing prevents scissor lift from reaching to the back of the shelf. Since the separation, the employer provides a metal pole with hooks to pull product from the back of the shelves. Other people, including assistant and co-managers, have moved product with and without climbing on the steel. Assistant Manager Patrick told Fetty over a year ago to get the job done and get off the shelving if a customer needed help but standing on shelving was not allowed in the back area. The employer did not follow the progressive discipline policy sequence. A year and a half ago another associate was fired for the same issue.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code § 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 establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the incident under its policy. Even had claimant done as alleged, the employer has not established wrongful intent, since the scissor lift was not able to allow him to reach the product on the back of the shelf, no hook poles were available to him to use at the time, claimant was instructed to assist customers, and there were conflicting management instructions about how to do that. Since others, including members of management, did the same thing with varying consequences, the disparate application of the policy cannot support a disqualification from benefits. Benefits are allowed.

DECISION:

The August 28, 2012 (reference 01) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed. The benefits withheld shall be paid, provided he is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/kjw