IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DIANA L PADILLA Claimant **WAL-MART STORES INC** Employer	**APPEAL 18A-UI-01232-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/17/17** **Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the January 17, 2018 (reference 01) unemployment insurance decision that disallowed benefits based upon claimant's discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on February 21, 2018. The claimant, Diana L. Padilla, participated personally and was represented by attorney Douglas E. Johnston. The employer, Wal-Mart Stores, Inc., was represented by Jennifer Rice and participated through witnesses Kimberly Fadiga and Robert Collins.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a department manager for ladies' wear. Claimant was employed from May 7, 2014 through December 6, 2017, when she was discharged. Claimant's job duties included processing freight, price changes and helping customers at the store.

As part of her job duties, claimant was required to process price changes for products. This was completed by following the store and corporate guidelines in place to mark down prices on a list of products. Only salaried management determined what the in store price reductions for products would be, not claimant. Claimant was tasked with completing the price reductions by scanning the items and changing the price according salaried management's instructions. Claimant was not authorized to make decisions as to what price the products would be marked down to. She was only required to make the physical changes to the products according to the prices that salaried management decided.

Beginning approximately July 20, 2017, Mr. Collins conducted an investigation into claimant and another co-worker named Josefina. Josefina was the manager of men's wear. Mr. Collins is the asset protection manager for employer.

On July 20, 2017, claimant marked down travel bags to an amount that was inconsistent with management guidelines. She then proceeded to purchase the merchandise at the reduced price. On August 2, 2017, claimant marked down clothing to a price that was inconsistent with management guidelines and Josefina purchased the merchandise. On August 23, 2017, claimant approached the cash register to purchase an item and told the co-worker the price should be $1.00 when it was actually $3.00. Claimant purchased the merchandise at the incorrect discounted price. On August 23, 2017, claimant also used another co-worker's discount card instead of her own, which was in violation of company policy. On October 19, 2017, claimant purchased four jersey shirts that Josefina had incorrectly marked down to a total price of $4.00 for four shirts instead of $47.00 for four shirts. On October 20, 2017, Josefina incorrectly marked down a jacket to $3.00 when it was supposed to be priced at $11.00 and claimant purchased it at the incorrect marked down price. On October 27, 2017, claimant incorrectly marked down a shirt to a reduced price and Josefina purchased it at the incorrect marked down price. On November 9, 2017, claimant marked down clothing to incorrect prices and purchased the clothing herself for a loss of over $65.00 to the employer. The final incident leading to claimant's discharge occurred on November 28, 2017 when Josefina incorrectly marked down prices on merchandise and claimant purchased those items. On each of these occasions when claimant made purchases, she did not wait at least one day to purchase the items, pursuant to the employer's written associate purchase policy. Claimant was aware of the written associate purchase policy when she completed training and had access to the employer's written associate purchase policy via the employer's computer system.

When claimant was interviewed about the transactions she admitted that the items that were purchased were incorrectly marked down so her and Josefina could purchase the items at the cheaper price. Claimant further admitted that she abused her position in order to incorrectly mark down prices and purchase them at a discount.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for job-related misconduct. Benefits are denied.

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

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.

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(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*. After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the Administrative Law Judge finds that Mr. Collins' testimony is more credible than claimant's testimony.

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). 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). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.* 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). Further, poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). A lapse of 11 days from final act until discharge when claimant was notified on fourth day that his conduct was grounds for dismissal did not make final act a "past act". *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988).

This was not an incident of carelessness or poor work performance. Claimant intentionally marked down prices incorrectly so she and Josefina could purchase items at a discount, to the loss of the employer. Further, claimant failed to wait at least one day after the mark down to purchase the items on multiple occasions, which was in violation of the employer's written policy.

It is clear that claimant's actions were intentional and they were a substantial violation of the employer's policies and procedures. Accordingly, the employer has met its burden of proof in establishing that the claimant's conduct consisted of deliberate acts that constituted an intentional and substantial disregard of the employer's interests. These actions rise to the level of willful misconduct, even without prior warning. As such, benefits are denied.

DECISION:

The January 17, 2018 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for job-related misconduct. Unemployment insurance benefits are denied until claimant has worked in and earned wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

_____
Dawn Boucher
Administrative Law Judge

_____
Decision Dated and Mailed

db/rvs