

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RICK A NIEMIER

Claimant

APPEAL NO. 10A-UI-09004-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 05/16/10

Claimant: Respondent (1)

Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 9, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 5, 2010. Claimant Rick Niemier participated personally and was represented by attorney Robert Wilson. Joe Bolt, Assistant Manager, represented the employer. When Mr. Bolt learned at the start of the hearing that Mr. Niemier had legal representation, Mr. Bolt requested to postpone the hearing. The hearing had already been rescheduled at the employer's request. The administrative law judge denied the last minute reschedule request based on the employer's failure to show good cause for further rescheduling the hearing. Mr. Bolt then terminated the employer's participation in the hearing, citing only the fact that Mr. Niemier had legal representation as the reason for terminating the employer's participation in the hearing.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Rick Niemier was employed by the Sam's Club in Marion from February 2008 until May 7, 2010, when Ken Vogel, General Manager, discharged him from the employment for touching another employee. Mr. Niemier had begun the employment as a part-time checker, but became a full-time produce associate four months into the employment. Mr. Niemier's immediate supervisor was Deb Bowers, Team Lead of Produce.

During the last week of April 2010, Mr. Niemier arrived for his shift and found a pallet missing from a display. Mr. Niemier assumed that Assistant Manager Joe Bolt had removed the pallet. Mr. Niemier knew that Mr. Bolt liked to play practical jokes. Mr. Niemier saw Mr. Bolt sitting in the managers' office and asked him if he had removed the pallet. Mr. Bolt denied removing the pallet. Mr. Niemier used his hand to brush the hair on the back of Mr. Bolt's head in a joking manner. Mr. Niemier did not to any extent hit Mr. Bolt. Mr. Bolt then asked Mr. Niemier how had had known that Mr. Bolt removed the pallet. Both men shared in the joke and had a laugh.

During the first week of May 2010, Mr. Niemier again saw Mr. Bolt sitting in the managers' office. Mr. Niemier again used his hand to brush hair on the back of Mr. Bolt's head in a joking manner. Mr. Niemier did not to any extent hit Mr. Bolt. Both men laughed. Mr. Bolt asked Mr. Niemier why he had brushed his hair. Mr. Niemier said he could still not believe Mr. Bolt had removed the pallet. Both men continued to laugh and Mr. Niemier went on his way.

On May 6, Mr. Bolt approached Mr. Niemier in the back room and asked to speak to him. Mr. Bolt told Mr. Niemier that as a matter of personal preference he did not like to be touched. Mr. Niemier apologized and told Mr. Bolt he would not touch him again. Mr. Bolt accepted Mr. Niemier's apology. Mr. Niemier saw Mr. Bolt later in the shift and both men laughed and joked with one another.

When Mr. Niemier arrived for work on May 7, 2010, an assistant manager summoned him to a meeting and asked him about what had happened between Mr. Niemier and Mr. Bolt. Mr. Niemier explained the above interactions. The assistant manager then told Mr. Niemier he was discharged from the employment for touching another employee.

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a “current act,” the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. 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 employer voluntarily terminated its participation at the start of the hearing and failed to present any evidence whatsoever to support an allegation that Mr. Niemier was discharged for misconduct in connection with the employment.

The evidence in the record establishes a friendly, good-natured relationship between Mr. Niemier and Mr. Bolt that included joking with one another. The weight of the evidence indicates that in the course of that friendly, good-natured interaction, Mr. Niemier made the good-faith error in judgment of brushing his hand against the hair on the back of Mr. Bolt’s head in an attempt to be—for lack of a better word—playful. The conduct was not assaultive in nature. The conduct was not intended to intimidate or offend. The conduct did not rise to the level of horseplay. As soon as Mr. Bolt gave indication that he did not care for the contact, Mr. Niemier apologized and agreed to discontinue the behavior.

The evidence in the record fails to establish misconduct in connection with the employment. Mr. Niemier was discharged for no disqualifying reason. Mr. Niemier is eligible for benefits, provided he is otherwise eligible. The employer’s account may be charged for benefits paid to Mr. Niemier.

DECISION:

The Agency representative’s June 9, 2010, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer’s account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw