

BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

DOROTHY M NEE

Claimant,

and

WAL-MART STORES INC

Employer.

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HEARING NUMBER: 08B-UI-08889

EMPLOYMENT APPEAL BOARD
DECISION

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-a

DECISION

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Dorothy M. Nee, worked for Wal-Mart Stores, Inc. from December 12, 2006 through August 5, 2008 as a full-time deli sales associate. (Tr. 2, 5) On July 26, 2008, the employer observed the claimant "... slice meat for herself... sit it on the scale to be weighed... lift some off and print the label and the add more [meat]... to it and bag it for herself." (Tr. 3) Denise Smith, the claimant's supervisor, noted a bag of meat in the cooler that appeared to weigh more than the amount printed as its worth. She reweighed it, printed the corrected new label, and waited for the claimant to take the meat to pay for it after her shift.

Ms. Smith reported the incident to the employer who led an investigation into the matter without

confronting the claimant. (Tr. 4) On August 5, 2008, the employer called the claimant into the office

(Tr. 6) where Carol Mullihan, the Protection Coordinator, and Jody Jensen indicated they had proof of her overweighing cold cuts. (Tr. 6-7) Ms. Nee asked if she was being terminated to which the employer informed her that everything depended on how well she cooperated. (Tr. 7) The claimant admitted overweighing the meat for customers, as did all other employees who worked the deli. The employer questioned her as to how often this occurred. After the questioning, Dave Forsyth came into the room to give the claimant her exit papers and requested the return of her badge and other company equipment. (Tr. 8, 10)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2007) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993)).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. 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 Board, 616 NW2d 661 (Iowa 2000).

The claimant admitted that she weighed meat and tagged it for its original price, and subsequently adding additional meat prior to wrapping the same. Her argument that it was common practice is not so convincing as to mitigate her inappropriate behavior. However, the record clearly establishes that Ms. Nee's supervisor witnessed the claimant in action on July 26th. Yet, the employer took no action until ten days later to confront her about the incident.

871 IAC 24.32(8) provides:

Past acts of misconduct. While past acts and warning 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. (Emphasis added.)

The court in Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988) held that in order to determine whether conduct prompting the discharged constituted a "current act," the date on which the conduct came to the employer's attention and the date on which the employer notified the claimant that said conduct subjected the claimant to possible termination must be considered to determine if the termination is disqualifying. Any delay in timing from the final act to the actual termination must have a reasonable basis. The employer offered no explanation as to why the claimant was not informed that she was under investigation; nor did the employer offer any reason why it continued to allow the claimant to work in light of their alleged proof that she had, in essence, stolen meat from the deli. For this reason, we conclude that the claimant failed to satisfy their burden of proof in establishing with current act of misconduct.

DECISION:

The administrative law judge's decision dated October 20, 2008 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

John A. Peno

Elizabeth L. Seiser

DISSENTING OPINION OF MONIQUE F. KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

Monique F. Kuester