

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ALLEN C SIMMS
Claimant

WALMART INC
Employer

APPEAL 19A-UI-07490-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/11/19
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r.871-24.32(8) – Current Act of Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer/appellant, Walmart Inc., filed an appeal from the September 11, 2019, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 15, 2019. The claimant did not respond to the notice of hearing to furnish a phone number with the Appeals Bureau and did not participate in the hearing. The employer participated through Tiffany Witt, store manager. Employer Exhibit 1 was admitted. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a production associate and was separated from employment on August 12, 2019, when he was discharged.

When the claimant was hired in 2011, he was trained on employer rules and procedures. The employer has rules and a code of conduct as it relates to integrity in the workplace. On March 12, 2019, the claimant was counseled as it related to integrity and timekeeping records.

The final incident occurred on July 17, 2019, when the claimant “double dated” a loaf of bread that was supposed to have been pulled due to its expiration date. Instead, the claimant placed a second label over the original sticker, which reflected the bread was still good and could be sold. This was discovered by the employer on July 18, 2019. The claimant was permitted to continue working in his position from July 18 until August 12, 2019 when he was discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3,165.00, since filing a claim with an effective date of September 11, 2019. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. The employer's representative stated the employer would not be participating when called for the interview. There is no evidence a written response or rebuttal witness was furnished in lieu of participation.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged for a current act of misconduct. Benefits are allowed.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

Iowa Administrative Code rule 871-24.32(1)a provides:

"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).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). 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).

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.

The most recent incident leading to discharge must be a current act of misconduct in order to disqualify an individual from receiving benefits. This incident must occur within a reasonable period from the discharge date. The issue is when the employer learned of the current act and did it act to terminate the individual within a reasonable period of time. In this case, the employer became aware of the claimant's conduct on July 18, 2019 and did not discharge the claimant until August 12, 2019.

The employer cannot on one hand argue that the claimant's conduct was so egregious that it warranted discharge instead of a lesser penalty, but then allow the claimant to continue working for almost a month before determining he should be discharged. Although the claimant may have engaged in a final act of misconduct by double dating a loaf of bread that should not have been sold as it was past its expiration date, inasmuch as the employer knew of the incident the same day, did not advise the claimant it was an issue he would be investigated, and allowed him to work in the same capacity for nearly a month, the act for which the claimant was discharged was no longer current.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to a current act of job related misconduct. Accordingly, benefits are allowed provided the claimant is otherwise eligible.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges are moot.

DECISION:

The September 11, 2019 (Reference 01) initial decision is affirmed. The claimant was discharged for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

Jennifer L. Beckman
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Decision Dated and Mailed

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