

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

PAUL LEHMAN
PO BOX 532
GRISWOLD IA 51535

WAL-MART STORES INC
c/o FRICK UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

RICHARD STURGEON
PO BOX 3372
SIOUX CITY IA 51102-3372

Appeal Number: 05A-UI-08916-JTT
OC: 07/10/05 R: 03
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Wal-Mart filed a timely appeal from the August 19, 2005, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on October 20, 2005. Richard Sturgeon represented the claimant, but the claimant did not personally participate. Steve Pitts of TALX UC eXpress represented the employer and presented testimony through Store Manager Adam Armstrong and Assistant Manager Bobby Jones. Exhibits One through Five were received into the record.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Paul Lehman was employed by Wal-Mart as a full-time maintenance associate from March 9,

2005 until July 11, 2005, when Assistant Manager Lisa Wacker discharged him for misconduct. Ms. Wacker is no longer employed by Wal-Mart.

The final incident that prompted the discharge occurred on July 10, 2005. On that day, a member of management overrode the computerized employee time-reporting system to clock-in Mr. Lehman shortly after 7:00 a.m. Mr. Lehman was not scheduled to work until 11:00 a.m. The computerized employee-reporting system would not have allowed Mr. Lehman to clock himself in so long before the scheduled start of his shift. It is not clear whether Mr. Lehman requested to be clocked in or knew he was clocked in on the time-reporting system. At shortly after 7:00 a.m., Mr. Lehman spent 45 minutes in the cafeteria area of the store. Mr. Lehman was not performing work at the time he was in the cafeteria. One or more coworkers alerted the management to Mr. Lehman's extended presence in the cafeteria. It is not clear where Mr. Lehman went when he was done in the cafeteria, including whether he remained in the store. Mr. Lehman did work at some point during the day in question.

Store Manager Adam Armstrong and Assistant Managers Lisa Wacker and Bobby Jones reviewed the employee time-reporting information and video surveillance records. These records confirmed that Mr. Lehman was resting in the cafeteria for 45 minutes at a time when the employee time-reporting system indicated he had just clocked in. On July 11, Ms. Wacker met with Mr. Lehman and discharged him for "theft of time" in violation of the employer's policies and procedures. Mr. Lehman had been formally reprimanded on one prior occasion. The June 30, 2005 reprimand pertained, in relevant part, to Mr. Lehman not adhering to his scheduled hours of employment. Mr. Lehman would arrive early for work and an overnight manager would override the employee time-reporting system so that Mr. Lehman could go on the clock before the scheduled start of his shift. Mr. Lehman would then leave work before the scheduled end of his shift. Store Manager Adam Armstrong had counseled Mr. Lehman at some unspecified point in the employment when he observed Mr. Lehman shopping in the men's department while he was supposed to be working. This counseling was not reduced to a formal reprimand.

Wal-Mart's policy regarding breaks is set forth in writing on the employer's computer network system. The policy is generally reviewed with employees at the start of employment, but it is not clear whether and to what extent the policy was reviewed with Mr. Lehman at the start of his employment. On April 7, 2005, Mr. Lehman completed online training regarding the employer's policy concerning breaks.

In preparation of the unemployment insurance proceedings, after Mr. Lehman was discharged and after Assistant Manager Lisa Wacker was no longer in Wal-Mart's employ, Store Manager Adam Armstrong contacted Ms. Wacker and asked her to prepare a statement concerning the discussion she had with Mr. Lehman leading up to his discharge. On August 2, Ms. Wacker prepared a written statement concerning the events of July 11. See Exhibit Five. Mr. Armstrong intentionally did not ask Ms. Wacker to testify at the hearing. Neither Mr. Armstrong nor Assistant Manager Bobby Jones participated in the discussion with Mr. Lehman that preceded his discharge or participated in the discharge itself.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Lehman was discharged for misconduct in connection with his employment.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Since the claimant was discharged, 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 to misconduct, a discharge her 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).

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 has failed to meet its burden of proving that Mr. Lehman was discharged for misconduct. The employer had within its power the ability to produce more direct and satisfactory evidence in the form of (1) testimony from Ms. Wacker; (2) testimony from the manager who overrode the time-reporting system to clock in Mr. Lehman on July 10; (3) testimony from employees who may have interacted with Mr. Lehman on July 10, and records documenting the time Mr. Lehman was on the clock on July 10. In addition, the hearing revealed several gaps in the evidence presented by the employer that prevent the administrative law judge from concluding, without inappropriately shifting the burden of proof to the claimant, that the employer has met its burden of proving misconduct.

Based on the evidence presented at the hearing and the applicable law, the administrative law judge concludes that Mr. Lehman was discharged for no disqualifying reason. Mr. Lehman is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Lehman.

DECISION:

The Agency representative's decision dated August 19, 2005, reference 03, 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 for benefits paid to the claimant.

jt/kjw