IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CHARLENE KELLY
Claimant

WAL-MART STORES INC
Employer

APPEAL NO: 14A-UI-01317-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/05/14
Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 27, 2014, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on February 26, 2014. The claimant participated in the hearing. Jessica McGraw, Asset Protection Manager and Joanne Heath, Assistant Manager, participated in the hearing on behalf of the employer. Employer's Exhibits One through Seven were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time service desk associate for Wal-Mart from November 15, 2009 to January 7, 2014. She was discharged for writing a note the employer determined was threatening in nature.

On January 2, 2014, the claimant was working at the service desk by herself, even though she had a long line at her counter and had requested additional help from management. While the claimant was taking care of customers an off-duty associate came through the claimant's line to cash her paycheck, pay the fee, and exchange it for a debit card the employer provides employees who cash their paychecks with the employer. The claimant was upset that the associate came through her line when she was so busy and because the associate remarked that if the claimant was not so busy she would have also brought her grocery cart through the service desk counter, indicating her awareness of how busy the claimant was at the time. The employer's policy does not prohibit off-duty employees from going through any check-out line.

After the associate had gone through her line, the claimant wrote a one sentence note which expressed her anger about that associate going through her line when she was busy. The note stated, "So help me God if she ever comes up again when I'm busy and expects me to ring up her shit when I'm the only one up here and (a) line past game room and then gives me a dirty

look I will seek revenge" (Employer's Exhibit One). The claimant stapled the note to the employer's copy of the associate's receipt for her debit card and put it in the drawer. She intended to take it out and throw it away in the store's main garbage container but forgot to do so and the accounting department discovered it the following day. After interviewing the claimant and a witness to whom the claimant showed the note and taking written statements from both of them, the employer terminated the claimant's employment because she had three previous performance based written coaching notices in her file and the note-writing incident brought her total number of written warnings to four, which results in termination from employment under the employer's policy (Employer's Exhibits Two through Six).

The claimant's other warnings occurred November 9, 2012, for not allowing cashiers to leave at their scheduled times when she was supervising the front end; November 13, 2012, for leaving a bag containing $2,000.00 unattended on a counter; and September 15, 2013, after she experienced cash shortages of $9.00 and $27.00 August 18 and September 4, 2013, respectively, and incorrectly loaded a payroll check onto a debit card September 10, 2013; and entered $2.75 from a customer's check instead of $275.00.

The claimant suffered a major heart attack September 13, 2011, and is still experiencing the aftereffects at the present time. She acknowledges her errors with regard to the first two written warnings and agrees she made the errors stated in the third written warning but explained that since her heart attack she sometimes transposes numbers and believes that is what happened during the incidents cited in the third warning.

The claimant stated that the final incident was the result of advice given to her by her cardiac rehabilitation therapist who gave her an article from the internet entitled, "The Skool of Life – 10 Ways That Writing Can Help You De-Stress." The article speaks to the virtues of using writing in response to situations that cause stress, anger or anxiety. The fifth entry states, "Writing removes anger. Take a pen and paper to write down all of the angry thoughts that you have. The page does not have to be shown to anyone. Focus on the anger and release it through the words that you have. Write about the revenge tactics that you want to take with the situation. (Emphasis added). By paying attention to the anger that you have, you are releasing it harmlessly into the world and pulling you emotional state back to a good baseline." The claimant agrees she was angry with the associate for coming through her line when she was busy and consequently she wrote the note expressing her anger and that she would "seek revenge" but stated the note was nothing more than her expressing her anger in the manner she was instructed by her cardiac rehab therapist. She did not intend to give it to the associate who came through her line or for her or anyone else to see it when she wrote it and the associate who angered her was never aware of the note. She said she did not throw it away immediately but put it in the register because she did not want customers to see it. The other reason she did not throw it away was because she was cleaning up and had already emptied the trash in her area and did not want to have to do it again so she planned to throw it away in another garbage can elsewhere in the store.

After the employer completed its investigation it concluded that although standing alone this incident would not result in termination, because the claimant had three previous written warnings, dating back to November 9, 2012, her employment should be terminated and she was notified of her discharge January 7, 2014.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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 proving disqualifying misconduct. 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 N.W.2d 661, 665 (Iowa 2000).

Without explanation, the note written by the claimant threatening revenge, about an off-duty associate going through her line during a busy time, might well be considered misconduct; when put in context, however, her actions were not as inappropriate as first appears. The claimant scribbled the note out of anger, in following the advice of a licensed medical professional who gave her an article detailing how to respond to feelings of anger through writing. The article suggests that the reader write down her feelings of anger and "write about the revenge tactics that you want to take with the situation." The information in the article does not advise the patient to ever act on her feelings of anger and states the writing "does not have to be shown to anyone." The claimant did not give the note to the associate she was upset with and planned to throw it away but instead put it in the register where it was discovered by the accounting staff. The employer recognized this was not a direct threat against the other associate and indicated had the claimant not had three prior warnings this incident would not have resulted in

termination of her employment, as it was not considered a serious workplace violence policy violation.

While the claimant did have three previous written warnings issued November 9, 2012, November 13, 2012, and September 15, 2013; all of those violations occurred after the claimant suffered a serious heart attack that affected her mentally as well as physically. She agrees she should have let the cashiers leave when scheduled on one occasion when she was supervising the front end of the store prior to being demoted; she accepts responsibility for leaving the bag containing $2,000.00 unattended on a counter; and admits she made errors on her drawer that appeared as $9.00 and $27.00 shortages and had difficulty with numbers, sometimes transposing them, after her heart attack.

In order for a claimant's actions to be disqualifying misconduct, those actions must be substantial, willful, and intentional. In this case the claimant followed the instructions of a medical care provider in writing down her feelings when she became angry rather than confronting the associate. But for the article from the cardiac rehab therapist the claimant would not have written the note. While an unorthodox defense of her actions, because of the therapist's recommendations, it is nonetheless an effective explanation of why she wrote the note. The claimant's previous warnings do not demonstrate a pattern of bad behavior and the last written warning, if not the other two, could reasonably be ascribed to the aftereffects of her heart attack in September 2011. Under these circumstances, the administrative law judge concludes the claimant was venting in a manner prescribed by a trained therapist and consequently those actions should not be the basis for a disqualification from unemployment insurance benefits. Therefore, benefits are allowed.

DECISION:

The January 27, 2014, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/pjs