

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CANDACE HAMILTON
Claimant

WALMART INC
Employer

APPEAL 21A-UI-19492-SN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 06/06/21
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Recovery of Benefit Overpayment
PL 116-136, Sec. 2104 – Federal Pandemic Unemployment Compensation

STATEMENT OF THE CASE:

The employer, Wal-Mart Inc., filed an appeal from the August 19, 2021, (reference 02) unemployment insurance decision that granted benefits based upon the conclusion she was discharged, but not due to work-related misconduct. The parties were properly notified of the hearing. A telephone hearing was held on October 26, 2021. The claimant did not participate. The employer participated through Coach Zondra Wilburn and Unemployment Insurance Manager II Silvia Perea. Exhibit 1 and 2 were received into the record. Official notice was taken of the agency records.

ISSUES:

Whether the claimant's separation from employer is disqualifying?
Whether the claimant has been overpaid benefits?
Whether the claimant had been overpaid Federal Pandemic Unemployment Compensation benefits?

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 front end team lead from September 28, 2013, until this employment ended on June 9, 2021, when she was discharged. The claimant's immediate supervisor was Rachel Elwood.

The employer has an asset protection policy. It states that the employee must know for certain that the customer is not entitled to a particular item to stop them. The employee is supposed to let a customer go if there is any uncertainty about whether the item was purchased. This information is located on its Intranet system, Ulearn that outlines all of its various policies.

On June 4, 2021, the claimant stopped a customer from leaving the store with a bag of charcoal because she believed he had not purchased the item. The claimant was mistaken; the customer had bought the item. The claimant grabbed the bag of charcoal and would not let go. People Lead Rachel Elwood and Store Manager Ryan Oshel subsequently informed Coach Zondra Wilburn of this information. Ms. Wilburn was initially unaware of what day the incident occurred. Ms. Perea provided the information regarding the date of the incident. Ms. Perea did not work at the store in question. She works out of the employer's headquarters in Bentonville, Arkansas. The employer did not make these firsthand witnesses available to testify because the claimant was subsequently rehired by the employer.

On June 9, 2021, Store Lead Ryan Cann conducted the termination meeting with the claimant. Neither of the employer's witnesses was aware if there were other staff at the termination meeting. Neither was aware if the claimant admitted or denied the allegation. Mr. Cann was not made available to testify because the employer does not provide firsthand witnesses when a claimant subsequently is rehired by the employer.

The claimant had not been warned for similar misconduct in the past.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. The overpayment issue is moot because the claimant is entitled to benefits.

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).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

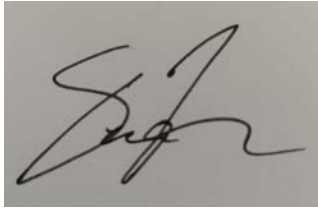
In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

The conduct for which claimant was discharged was merely an isolated incident of poor judgment. To the extent that the circumstances surrounding each accident were not similar enough to establish a pattern of misbehavior, the employer has only shown that claimant was negligent. "[M]ere negligence is not enough to constitute misconduct." *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 666 (Iowa 2000). A claimant will not be disqualified if the employer shows only "inadvertencies or ordinary negligence in isolated instances." 871 IAC 24.32(1)(a). When looking at an alleged pattern of negligence, previous incidents are considered when deciding whether a "degree of recurrence" indicates culpability. Claimant was careless, but the carelessness does not indicate "such degree of recurrence as to manifest equal culpability, wrongful intent or evil design" such that it could accurately be called misconduct. Iowa Admin. Code r. 871-24.32(1)(a); *Greenwell v. Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. Mar. 23, 2016). Ordinary negligence is all that is proven here. Because the employer has failed to establish disqualifying misconduct, benefits are allowed, provided claimant is otherwise eligible.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. While this rule is not applicable where the underlying misconduct is obvious, it does apply in circumstances such as this one where the claimant appears to have been engaging in the behavior, albeit erroneously, to benefit the employer's interest. Benefits are granted.

DECISION:

The August 19, 2021, (reference 02) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The overpayment issue is moot because the claimant is entitled to benefits. Any benefits claimed and withheld on this basis shall be paid.

A handwritten signature in black ink, appearing to read 'Sean M. Nelson', is written over a light gray rectangular background.

Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 725-9067

November 18, 2021
Decision Dated and Mailed

smn/scn