

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DONALD K BATES

Claimant

APPEAL NO. 12A-UI-05834-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 04/15/12

Claimant: Appellant (2)

Section 96.5-2-A – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a decision of a representative dated May 16, 2012, reference 01, which held that the claimant was not eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 15, 2012. Claimant participated. The employer participated by Brandon Pohlman, the asset protection manager, and Dan McKinney, the store manager. The record consists of the testimony of Brandon Pohlman; the testimony of Dan McKinney; the testimony of Brandon Bates; and Employer's Exhibits 1-10.

ISSUE:

Whether the claimant was discharged for a current act of misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The claimant worked as a full-time sales associate at the Wal-Mart store located in Oskaloosa, Iowa. His last day of work was April 17, 2012. He was terminated on April 17, 2012, for theft of an associate's t-shirt.

The incident that led to the claimant's termination occurred on March 19, 2012. The employer had passed out t-shirts to the associates for having had a good safety record. The claimant received a t-shirt. On March 20, 2012, another associate reported that his t-shirt was missing. He had laid it down in the garden center and when he looked for it the next day, it was missing. Brandon Pohlman, the asset protection manager for the store, initiated an investigation. He reviewed the surveillance tapes. The tapes showed that the claimant had taken the t-shirt and stuffed it in a Wal-Mart bag.

The store manager became aware of the incident in the first week of April 2012. The claimant continued to work. He was not notified that there was an investigation ongoing. The claimant was terminated on April 17, 2012.

REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 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.

Misconduct that leads to disqualification from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Theft of property can constitute misconduct because one of the most fundamental duties owed by an employee to an employer is honesty. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8) See also Greene v. EAB, 426 N.W.2d 659 (Iowa Ct. App. 1988) 426 N.W.2d 659 (Iowa App. 1988) The employer has the burden of proof to show misconduct.

The issue in this case is whether the claimant was discharged for a *current* act of misconduct. In order to determine whether there is a current act of misconduct, it is necessary to look to the

date of termination, or at least of notice to the employee of possible disciplinary action, and comparing this to the date the misconduct first came to the attention of the employer. In this case, nearly one month lapsed between the time the employer first learned of the possible theft and the actual termination. The claimant was never notified that there was an ongoing investigation. He was allowed to continue to work.

While it is true that employers are given a reasonable amount of time to investigate an allegation of misconduct prior to termination, a one-month period of time is not reasonable. The administrative law judge understands that the employer has in place strict policies on how employee theft is investigated and the employer may have good business reasons for these policies. But the law only allows disqualification from receiving unemployment insurance when the discharge is for a current act of misconduct. Had the claimant been notified of an ongoing investigation or been placed on suspension, the result may have been different. The employer allowed the claimant to continue working even after all the evidence had been reviewed and by the first week of April, 2012, the store manager was involved and knew what was going on. Even then the termination did not take place until April 17, 2012. Because the claimant was not terminated for a current act of misconduct, benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated May 16, 2012, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css