

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TAMMY I BOOTH
Claimant

APPEAL NO. 17A-UI-11970-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 10/22/17
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Tammy Booth filed a timely appeal from the November 13, 2017, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Ms. Booth was discharged on October 21, 2017 for violation of a known company rule. After due notice was issued, a hearing was held on December 12, 2017. Ms. Booth participated and represented herself at the hearing. Michele Hawkins of Equifax represented the employer and presented testimony through Chris Wiley. Exhibits A, H, J, K and L were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Tammy Booth was employed by Wal-Mart in Storm Lake as a full-time Front Zone Manager until October 21, 2017, when the employer discharged her for theft. Ms. Booth had started her employment at the Store Lake Wal-Mart in 2006.

On October 19, 2017, Chris Wiley, Asset Protection Associate, observed Ms. Booth use a self-check register to obtain two T-shirts without paying for them. Mr. Wiley watched as Ms. Booth surreptitiously avoided scanning the t-shirts and placed them into a bag with other merchandise that she had scanned and purchased. Ms. Booth then left the store with the stolen t-shirts. The total retail value of the stolen t-shirts was \$14.42. Immediately after Mr. Wiley observed Ms. Booth use the self-check register, he reviewed the computer record of the transaction, which confirmed that Ms. Booth had not paid for the t-shirts. Mr. Wiley notified Jay Bickford, Store Director. At the time, the Storm Lake store's Asset Protection Manager was on vacation. Mr. Wiley contacted Phillip Roach, Asset Protection Manager at the Wal-Mart store in Worthington, Minnesota, to commence further investigation of Ms. Booth's conduct. Mr. Roach provided Mr. Wiley with the computer record of Ms. Booth's use of her employee discount during the period of September 1, 2017 through October 19, 2017. Ms. Booth had used her

employee discount in connection with the October 19 transaction. Mr. Wiley reviewed video surveillance of the previous transactions and observed similar thefts of merchandise on September 3, 10, 22, 25, October 6 and 18, 2017. In each instance, Ms. Booth used the self-check register, paid for some items, intentionally avoided paying for other items, and bagged the unpurchased merchandise with the purchased merchandise.

On October 21, 2017, Mr. Wiley again monitored Ms. Booth's use of a self-check register and observed as she stole two cans of dog food by scanning only three out the five cans that she then bagged together.

On October 21, 2017, subsequent to the theft incident on that day, Mr. Roach arrived at the Storm Lake store to question Ms. Booth regarding the theft incidents Mr. Wiley had personally observed and the additional documented theft incidents from September 3, 2017 through October 18, 2017. During the interview, Ms. Booth admitted to leaving the store with merchandise she had not purchased. Ms. Booth attempted to excuse her conduct by referencing an emotional upset following the loss of a family pet. Ms. Booth provided a written statement that included the following admission: "I have noticed that a few transactions were or have been missing items on my sales receipt." Ms. Booth had not previously brought such matters to the employer's attention so that the employer could receive appropriate compensation for the items that Ms. Booth obtained without payment. At the close of the October 21, 2017 meeting, the employer notified Ms. Booth that she was discharged from the employment.

Ms. Booth denies knowledge of employer policies that she was charged with enforcing as part of her supervisory duties. Ms. Booth was fully aware of all such relevant employer policies. These included an Associate Purchases Policy. The policy predated the employer's use of self-check registers and did not specifically address such transactions. However, the policy addressed and prohibited other forms of self-dealing. The policy prohibited employees from ringing up merchandise for less than the intended selling price. The policy prohibited employees from taking merchandise from the facility unless it was paid for and accompanied by a cash register receipt. The policy counseled employees to act with integrity and honesty by bringing to the attention of a salaried manager any instance in which the employee noted an item to be priced incorrectly or scanned incorrectly. The policy advised that the employer would investigate deviations from the Associate Purchases Policy and that an employee deemed to have violated the policy would be subject to discipline up to and including discharge from the employment.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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 of misconduct, a discharge for 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). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with

other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The weight of the evidence, reason and common sense lead the administrative law judge to conclude that Ms. Booth knowingly provided false and misleading testimony at the appeal hearing. During the hearing, Ms. Booth feigned ignorance of policies she had worked under for more than a decade, policies that she was charged with enforcing amongst subordinates. Ms. Booth falsely and unpersuasively asserted that her multiple thefts were merely scanning errors attributable to machine malfunctions. Neither Ms. Booth nor the weight of the evidence provided a reason for the administrative law judge to discount the testimony of Mr. Wiley, who, Ms. Booth concedes, was merely doing his job when her conduct attracted his attention.

The weight of the evidence in the establishes that Ms. Booth knowingly and intentionally stole from the employer on several occasions between September 3, 2017 and October 21, 2017 by manipulating self-check transactions to obtain merchandise without paying for the merchandise. Ms. Booth knew at the time she committed each theft from the employer that her actions were wrong and contrary to the employer's ownership interest in the property she obtained without payment. Each of the theft incidents demonstrated an intentional and substantial disregard of the employer's interests. Each of the theft incidents was sufficient to establish misconduct in connection with the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Booth was discharged for misconduct in connection with the employment. Accordingly, Ms. Booth is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Booth must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The November 13, 2017, reference 01, decision is affirmed. The claimant was discharged on October 21, 2017 for misconduct in connection with the employment, to wit, theft. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs