

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

MATTHEW NICHOLSON
Claimant

APPEAL NO. 18A-UI-06301-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WALMART INC
Employer

OC: 04/29/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Matthew Nicholson filed a timely appeal from the May 31, 2018, reference 01, decision that disqualified Mr. Nicholson for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Nicholson was discharged on May 2, 2018 for violation of a known company rule. After due notice was issued, a hearing was held on June 25, 2018. Mr. Nicholson participated. The employer did not respond to the hearing notice instructions to register a telephone number for the hearing and did not participate. The hearing in this matter was consolidated with the hearing in Appeal Number 18A-UI-06302-JTT. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to the claimant.

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: Matthew Nicholson was employed by Walmart, Inc. as a full-time manager until May 2, 2018, when the employer discharged him from the employment for a policy violation alleged to have occurred in January 2018. Mr. Nicholson began his employment in September 2016. Until January 31, 2018, Mr. Nicholson was a Co-Manager at the Walmart store in Marion. While Mr. Nicholson was in the Co-Manager position, Chad Parker, Store Manager, was Mr. Nicholson's immediate supervisor. The employer eliminated Mr. Nicholson's Co-Manager position effective January 31, 2018. Mr. Nicholson thereafter remained on the Walmart payroll while he applied for other positions within the corporation. After a series of interviews, Mr. Nicholson commenced working as an Assistant Fresh Manager at the Ankeny Sam's Club effective March 19, 2018.

Toward the end of April 2018, a loss prevention agent interviewed Mr. Nicholson concerning some merchandise markdowns Mr. Nicholson had handled at the Marion Walmart store in January 2018. The Store Manager, Mr. Parker, had directed Mr. Nicholson to mark down older

stock electronics and toys. Mr. Nicholson performed the markdowns as directed. One of the items marked down was a drone aircraft that had originally retailed for \$70.00. The store had several of the drones in stock. Mr. Nicholson marked the items down to a price between \$10.00 and \$20.00. Mr. Nicholson asked Mr. Parker whether it would be okay if he bought one of the drones and Mr. Parker gave his approval. Mr. Nicholson then purchased one of the drones. Other associates bought some of the drones. Customers purchased the rest of the drones. The employer has a policy that prohibits the manager directing the markdown from purchasing the discounted item within 24 hours of the markdown. Mr. Parker and Mr. Nicholson agreed that since it was Mr. Parker who had directed Mr. Nicholson to mark down the merchandise, and since Mr. Nicholson only carried out the directive, that the company policy did not prohibit Mr. Nicholson from immediately purchasing one of the marked down drones. However, when the loss prevention agent interviewed Mr. Nicholson at the end of April 2018, the loss prevention officer asserted that Mr. Chapman was alleging that Mr. Nicholson had used Mr. Chapman's password and ID without authorization to take an unauthorized markdown.

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).

The evidence in the record establishes a discharge for no disqualifying reason. The employer did not participate in the hearing and did not present any evidence to meet its burden of proving a discharge for misconduct in connection with the employment. The evidence in the record fails to establish a knowing and intentional violation of any employer work rules. The evidence in the record fails to establish a reasonable basis for the substantial delay between the alleged misconduct in January 2018 and first broaching the subject with Mr. Nicholson at the end of April 2018.

Because the evidence in the record establishes a discharge for no disqualifying reason, Mr. Nicholson is eligible for benefits, provided he is otherwise eligible. The employer’s account may be charged for benefits.

DECISION:

The May 31, 2018, reference 01, decision is reversed. The claimant was discharged on May 2, 2018 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer’s account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs