

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**SEBASTIANO M ZARBANO**  
Claimant

**WALMART INC**  
Employer

**APPEAL 19A-UI-05964-CL**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 06/23/19**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

On July 26, 2019, the claimant filed an appeal from the July 24, 2019, (reference 01) unemployment insurance decision that denied benefits based on a separation from employment. The parties were properly notified about the hearing. A hearing was held in Sioux City, Iowa, on September 11, 2019. Claimant participated personally and through Dane' Zarbano. Employer elected not to participate in the hearing.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on January 25, 2011. Claimant last worked as a part-time maintenance person. Claimant was separated from employment on June 3, 2019, when he was terminated.

In 2014, claimant injured his brain while working for employer. Claimant filed a claim for workers' compensation benefits. As a result of the injury, claimant has permanent limitations including difficulty with keeping track of time, completing tasks, and processing information.

After claimant was released to return to work, employer attempted to assign him to work in many different positions. Claimant was finally successful in the position of greeter. However, employer recently decided to eliminate the position of greeter. Employer then assigned claimant to work in maintenance.

As a maintenance person, claimant was allowed 15 minute breaks. But unlike when he was working as a greeter, he had no co-workers relying on him to return to his post. Claimant was left keeping track of his break time on his own. Claimant was not always successful in doing this. Employer verbally warned claimant about the issue, but did not write him up or inform him his job was in jeopardy.

On June 3, 2019, claimant took a break that may have been longer than 15 minutes. If claimant took a break longer than 15 minutes, he did not do so intentionally. On that date, claimant also cleaned the mirrors in the restroom. An assistant manager informed claimant he did not do a sufficient job cleaning the mirrors and sent him back to repeat the task. Later during the shift, the assistant manager terminated claimant's employment. The assistant manager informed claimant she was terminating his employment because he took too long of a break and because he took too long to clean the mirrors the second time he was assigned to do so. The assistant manager stated that claimant was not performing the job of maintenance person correctly.

Claimant had never been previously disciplined regarding his failure to correctly perform cleaning or maintenance duties.

Claimant did the job to the best of his ability.

### **REASONING AND CONCLUSIONS OF LAW:**

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

Iowa Code § 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 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.

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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

In this case, employer terminated claimant's employment because he exceeded the allotted break time and because he took longer performing cleaning tasks than employer believed was necessary. Employer never previously warned claimant his job was in jeopardy for either of these issues. Claimant did not deliberately act in disregard of employer's interests. Instead, claimant performed his work duties and kept track of his breaks to the best of his ability, which in this case, was limited due to an injury suffered in the workplace.

Employer failed to establish claimant was terminated for misconduct.

#### **DECISION:**

The July 24, 2019, (reference 01) unemployment insurance decision is reversed. Claimant was separated for no disqualifying reason. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

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Christine A. Louis  
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Decision Dated and Mailed

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