

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

REBECCA A BREITBACH
Claimant

WALMART INC
Employer

APPEAL 19A-UI-07060-AW-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 08/11/19
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Claimant/appellant filed an appeal from the August 29, 2019 (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was held on September 30, 2019, at 9:00 a.m. Claimant participated. Employer participated through Jonathan Acevedo, Market Director. No exhibits were admitted.

ISSUE:

Whether claimant's separation was a discharge for disqualifying job-related misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as an Optical Manager from October 22, 2019 until her employment with Walmart, Inc. ended on August 13, 2019. (Acevedo Testimony) Claimant's direct supervisor was Jonathan Acevedo. (Acevedo Testimony)

Employer has an attendance policy that requires employees to notify employer of an absence by calling an attendance line and notifying their supervisor directly. (Acevedo Testimony) The policy is located in the employee handbook, which was available to claimant. (Acevedo Testimony) Claimant's job description stated it was her duty as the department manager to have her department staffed and if she could not then to notify her direct manager or the market manager. (Acevedo Testimony)

Claimant was absent from work on August 7, 2019 due to illness. (Acevedo Testimony; Claimant Testimony) Claimant's illness resulted in hoarseness. (Claimant Testimony) Instead of calling the attendance line, claimant notified employer via an automated online service. (Claimant Testimony) Claimant notified her direct supervisor via text message. (Claimant Testimony) Claimant provided notice prior to the beginning of her shift. (Claimant Testimony) There are two employees in claimant's department. (Claimant Testimony) Claimant forgot that the other employee was not scheduled to work on August 7, 2019 and did not arrange for other coverage of the department in her absence. (Claimant Testimony) Claimant had no prior incidents of or warnings for failing to ensure coverage of her department. (Acevedo Testimony)

Claimant received prior disciplinary actions in the form of written warnings on September 8, 2017, August 3, 2018 and January 30, 2019. (Acevedo Testimony) The warnings were related to claimant's job performance and productivity. (Acevedo Testimony) Claimant believed she had remedied the issues leading to poor job performance and productively since January 30, 2019 and that her job was not in jeopardy. (Claimant Testimony)

On August 13, 2019, employer terminated claimant's employment for failing to notify employer and arrange coverage for her department when she was absent from work on August 7, 2019. (Claimant Testimony)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged for no disqualifying reason. Benefits are allowed provided claimant is otherwise eligible.

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 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:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, 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).

Iowa Admin. Code r. 871-24.32(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.

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).

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 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).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

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. Training or general notice to staff about a policy is not considered a disciplinary warning. A warning for job performance and productivity would not put claimant on notice that her job would be in jeopardy for failing to ensure coverage in her absence. Employer's simple accrual of a certain number of warnings counting towards discharge does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits.

Claimant provided employer with appropriate notice of her absence on August 7, 2019. Therefore, the conduct for which claimant was discharged was the failure to provide coverage for her department in her absence. Claimant had never previously failed to ensure coverage for her department when she was absent. Therefore, the issue leading to the separation was merely an isolated incident of negligence. Employer 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. Claimant was discharged for no disqualifying reason. Benefits are allowed provided claimant is otherwise eligible.

DECISION:

The August 29, 2019 (reference 01) unemployment insurance decision is reversed. Claimant was discharged for no disqualifying reason. Benefits are allowed provided claimant is otherwise eligible.

Adrienne C. Williamson
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Decision Dated and Mailed

acw/rvs