

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CRYSTAL L MURPHY
Claimant

APPEAL NO: 14A-UI-11142-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 09/28/14
Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 15, 2014, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on November 17, 2014. The claimant participated in the hearing with her husband/witness Joseph Murphy. Lisa Ashmore, Personnel Coordinator, and Johnny Tuvera, Asset Protection Manager, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time cashier for Wal-Mart from February 12, 2008 to June 12, 2014. She was discharged because the employer alleged she took \$20 left behind by a customer.

On April 24, 2014 the claimant was working a register and was also responsible for watching four self-serve registers. A customer at one of the self-serve check outs used her debit card and indicated she wanted \$20 in cash back. She then left the store without retrieving the money she requested. The tray where the money comes out continued to beep after the customer walked away and the claimant removed it from the tray and went after the customer but could not catch up to her. She returned to her register and put the money under the monitor. A few days later the customer came back to the store looking for her \$20 and when it could not be located the employer opened an investigation.

On April 26 or 27, 2014 Asset Protection Manager Johnny Tuvera began reviewing video surveillance footage of the claimant's actions April 24, 2014. He observed the customer leave money in the tray at one of the self-serve check out stations and the claimant took the money out of the machine and tried to follow the customer. When the claimant reached the door she talked to one of the greeters for approximately 30 seconds and returned to her register. Mr. Tuvera could see the money in the claimant's hand while she pursued the customer but not

on her way back to her register. He did not actually see the claimant put the money in her pocket. Mr. Tuvera questioned the management team to see if anyone turned in the \$20 but no one had. He sent all of the information he gathered from interviewing management employees and the video tape to his supervisor. Mr. Tuvera did not interview the claimant.

On June 12, 2014 Asset Protection Manager Matthew Sparble, who came from another store, met with the claimant and talked to her about the incident from April 2014. Mr. Sparble then asked the claimant to write a statement of what happened April 24, 2014, after he told the claimant what he observed on video. The claimant stated she put the money under the monitor and denies taking the money. The employer terminated the claimant's employment June 12, 2014 for the April 24, 2014 incident.

A few weeks later the employer instructed Mr. Tuvera to call the claimant and inform her if she did not make restitution it would pursue the matter with the police department. After a few calls the claimant reluctantly returned and gave the employer \$20 because she had never been in trouble before and did not want to be in trouble over this incident.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code § 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.

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).

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 employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. 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 Board, 616 N.W.2d 661, 665 (Iowa 2000).

The employer watched the video surveillance tape of the situation involving the claimant April 24, 2014 and while it could not see the money in the claimant's hand on her way back from the front door it also did not see her put it in her pocket and take it either. Although she did make restitution to the customer through the employer several weeks later, the administrative law judge concludes she did so because she had a reasonable fear of the employer reporting the incident to the police as theft and simply wanted the situation dropped rather than because she committed a theft. The claimant's testimony that she did not take the money was credible.

Additionally, even if the administrative law judge found the claimant did take the money April 24, 2014 the claimant would still receive unemployment insurance benefits because the employer waited seven weeks between the alleged theft and the claimant's termination of employment. That delay removes the incident from the category of a current act of misconduct to a prior incident of misconduct, which cannot be the basis for a discharge. The employer was aware of the incident by April 27, 2014 but waited an unreasonable amount of time to take action against the claimant.

Under these circumstances, the administrative law judge must conclude the employer has not met its burden of proving disqualifying job misconduct as that term is defined by Iowa law. Therefore, benefits are allowed.

DECISION:

The October 15, 2014, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

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