

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

**JIMMY L WALKER**  
Claimant

**WAL-MART STORES INC**  
Employer

**APPEAL 17A-UI-11194-JCT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 09/24/17**  
**Claimant: Appellant (2)**

Iowa Code § 96.5(1) – Voluntary Quitting  
Iowa Code § 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the October 24, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 20, 2017. The claimant participated personally. The employer participated through Michael Bunn. Employer Exhibit 1 was admitted into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**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: The claimant was employed full-time as an auto technician beginning in 2009 and was separated from employment on September 25, 2017, when he was discharged.

The employer reported the claimant was discharged because he had accumulated more than three written warnings in a one year period. The employer did not present any written policies that the claimant violated or the specific policies that led to the claimant's discharge. Mr. Bunn was unaware of the claimant's entire job history as he was not the claimant's manager at hire.

The undisputed evidence is the claimant was issued a warning on January 13, 2017 when the claimant allegedly falsified his time card, which the claimant denied (Employer Exhibit 1). The claimant was then issued a written warning on February 28, 2017 because he was attempting to use an old gasket with a new filter, when performing maintenance on a vehicle. The claimant acknowledged he knew that a new gasket was to be used for a new filter, to ensure integrity of the seal, but had gotten impatient waiting and didn't want to make the customer wait (Employer Exhibit 1). The claimant was then issued a written warning on September 7, 2017, for allegedly

not entering cars into the terminal before beginning service on them. As a result, the employer reported that service times were skewed and affected staffing. The claimant stated it was a common occurrence that sometimes happened when people were busy and it was not intentional (Employer Exhibit 1). The warning referenced the claimant's lack of urgency and working slower than expected times (Employer Exhibit 1). The claimant acknowledged he knew he was "slow" at times but performed work to the best of his ability.

The final incident reportedly occurred over two incidents when the claimant reportedly did not consult with a lube guide and intended to use the customer's preferred oil for an oil change, and because he failed to properly report a vehicle that was stalling before it was returned to the customer. The claimant stated he had been repeatedly told by management that the customer's request is to be honored and employees should do what the customer wanted. Mr. Bunn stated the employer's policy is to consult with the lube guide and use the recommended oil for the specific car, regardless of customer preferences. In this case, the claimant did not actually perform the oil change using the wrong oil; he was just viewed over video surveillance not consulting the lube guide as expected, because he intended to use the customer's requested oil.

The other incident contributing to the decision to discharge the claimant involved a car that died when brought to the customer. According to the claimant, both he and his co-worker performed maintenance on the vehicle and the claimant saw it had no gas, which he believed was causing it to stall. He reported it to the customer, who then attempted to drive off and the vehicle "died". The employer denied the claimant reported the stall. Because the claimant had already received three written warnings, the employer did not prepare warnings for the final two incidents but instead discharged him.

## **REASONINGS 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 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).

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 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.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (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. 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. *Crosser v. Iowa Dept. of Public Safety*, 240 N.W.2d 682 (Iowa 1976).

Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). 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). When based on carelessness, the carelessness must actually indicate a “wrongful intent” to be disqualifying in nature. *Id.* In contrast, 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. *Huntoon, supra*; *Newman, supra*. 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).

The credible evidence presented does not support willful or deliberate conduct led to the claimant’s discharge. Rather, the claimant was a long term employee, who acknowledged being “slow” at times, which had led to his most recent warning before discharge (Employer Exhibit 1). The claimant also credibly testified he performed work to the best of his ability. Upon review of the final two incidents, which consisted of the claimant notifying a customer of a stalled vehicle that died when the customer tried to drive it, and the claimant not consulting a lube guide, the administrative law judge is not persuaded the claimant’s conduct was intentional.

Rather, the claimant did notify the customer that there was no gas, which was causing the vehicle to stall, regardless of any other issue, and the claimant intended to comply with the customer’s request, which was consistent with his past training. The administrative law judge recognizes the impact the claimant’s conduct could have had on customer relations if a car was not serviced with correct oil or died upon returning it to a customer, but the administrative law judge is not persuaded the claimant knew or should have known either incident could lead to his immediate discharge. The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant’s discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant’s discharge was due to job related misconduct. Accordingly, benefits are allowed provided the claimant is otherwise eligible.

#### **DECISION:**

The October 24, 2017 (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The benefits claimed and withheld shall be paid, provided he is otherwise eligible.

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Jennifer L. Beckman  
Administrative Law Judge

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Decision Dated and Mailed

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