IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

RAYMOND L TURNER
Claimant

WAL-MART STORES INC
Employer

APPEAL NO. 12A-UI-07796-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/20/12
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 19, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was started on July 19, 2012, and concluded on August 13, 2012. Claimant Raymond Turner participated personally and was represented by Raymond Snook, attorney at law. Steve Kopf, store manager, represented the employer. Exhibits One, Two, and Three were received into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the discharge was based on a current act.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Raymond Turner was employed by Wal-Mart as a full-time garden center associate for five years until May 20, 2012, when Steve Kopf, store manager, discharged him from the employment. Mr. Turner's immediate supervisor was Assistant Manager Scott Reddick.

The final incident that triggered the discharge occurred on May 1, 2012. On that day, Mr. Turner was off-duty, but had gone to the Wal-Mart store with his wife to shop. Mr. Turner's spouse had recently purchased a few plants for their home and, on May 1 Mr. and Mrs. Turner observed a plant similar to those Mrs. Turner had purchased. The plant Mr. Turner observed was sitting on the 50 percent off table but had not been marked down. Mr. Turner and his wife attempted to find a clerk in the garden center, but did not locate a clerk. Mr. Turner then used a Sharpie pen or crayon from the garden center to write a 50 percent discounted price on the plant. The full retail price of the plant was less than $4.00. The markdown price that Mr. Turner wrote on the plant was $1.74. Mr. Turner's action in writing the markdown on the plant was contrary to the employer's established policy and protocol. Zone Merchandizing Supervisor Jane Gullet observed Mr. Turner re-marking the plant with the lower price and reported the conduct to Assistant Manager Scott Reddick. Mr. Reddick directed the customer service

manager at the front of the store not to accept the discounted price written on the plant and to notify Mr. Reddick if Mr. Turner attempted to purchase the item at the discounted price.

A short while later, Mr. Turner did indeed attempt to purchase the plant at the discount price. The cashier called the customer service manager over to okay the lower price Mr. Turner had marked on the plant. Mr. Turner had told the cashier that he had marked the lower price on the plant and the cashier conveyed this same information to the customer service manager. The customer service manager denied the sale at the discounted price. Mr. Turner was not happy with the situation and made some curt remark to the effect that he would deal with the plant issue at another time. Mr. Turner purchased the other items he had brought to the register.

Mr. Reddick collected the plant in question and took it to the store's office. Mr. Reddick noted that the discounted price Mr. Turner had written on the plant was roughly 50 percent of the full retail price.

On May 3, Mr. Reddick and Store Manager Steve Kopf met with Mr. Turner to discuss the matter. Mr. Turner admitted to marking down the plant and explained that the rest of the similar plants had already been placed on clearance. Mr. Turner admitted that he had not been authorized to mark down the plant. Mr. Turner said he knew the item was supposed to be half price and had just put the correct price on the item. Mr. Turner admitted to taking the item to the cash register and admitted to telling the cashier to key in the discounted price. Mr. Kopf told Mr. Turner that he would need to consult with his superiors about how to proceed.

Mr. Turner continued to report for work and perform his duties until May 20, when a Mr. Reddick and another assistant manager met with him for the purpose of discharging him from the employment.

In making the decision to discharge Mr. Turner from the employment, the employer considered its policy regarding integrity and intentional dishonesty. The policy states:

> Striving for excellence means operating our business with high integrity, and avoiding deceptive, dishonest, or fraudulent activities. Fraudulent actions are not only unethical, but may also be a violation of law. You should manage your particular area of business with as much transparency as possible. You should encourage a work environment that supports the contributions of your associates, and is based on our company's values and ethics. Acts of fraud or dishonesty are more likely to occur in environments with insufficient controls and unrealistic expectations. In order to maintain excellence in our operations, you should encourage transparency, honesty, and realistic expectations.

The above policy appears under the heading of Leading with integrity in our marketplace. The text of the policy statement indicates it is directed at and intended for consideration by management staff, not directed at associates such as Mr. Turner.

REASONING AND CONCLUSIONS OF LAW:

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 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.

871 IAC 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.

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). 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. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The weight of the evidence in the record fails to establish a current act of misconduct. The evidence indicates that the conduct that triggered the discharge occurred on May 1, 2012 and came to the employer's attention on that day. The evidence indicates that the employer spoke to Mr. Turner about the incident on May 3, but did not suggest at that time that his employment was in jeopardy. The vague statement that Mr. Kopf would have to confer with the next level of management was not sufficient to place Mr. Turner on notice that he faced possible discharge

from employment. After the incident on May 1, Mr. Turner continued to report for work and performed his regular duties until May 20, when the employer notified him that he was discharged from the employment. The 19-day delay between the employer's knowledge of the incident and follow-up with Mr. Turner to let him know that the incident could or would result in his discharge of the employment was an unreasonable delay and caused the May 1 incident to no longer constitute a current act.

Even if the May 1 incident had indeed been a current act, the weight of the evidence in the record fails to establish that Mr. Turner acted with a willful or wanton disregard of the employer's interests. The evidence indicates that Mr. Turner attempted to find a clerk to assist him with the markdown that he believed would reflect the appropriate price of the item. The evidence indicates that a zone supervisor was standing by, unbeknownst to Mr. Turner, and instead of assisting Mr. Turner with the markdown or even asking him what he was doing, made the assumption of ill intent and reported it to the assistant manager as such. Mr. Turner was upfront with the cashier and with the customer service manager about the fact that he had written the discounted price on the plant. While it is not determinative, it is noteworthy that the difference between the full retail price of the item in question and the discounted price Mr. Turner marked on the item was less than $2.00. Yes, Mr. Turner should not have marked the discounted price on the item and should have instead taken other steps to have the item properly marked down, if it was supposed to be discounted. However, the weight of the evidence in the record indicates a good-faith error in judgment, rather than a willful or wanton disregard of the employer's interests.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Turner was discharged for no disqualifying reason. Accordingly, Mr. Turner is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Turner.

DECISION:

The Agency representative's June 19, 2012, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw