

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TRISH M PARVU
Claimant

APPEAL NO. 10A-UI-09381-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 05/23/10
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 18, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 17, 2010. Claimant Trish Parvu participated. Assistant Manager Mai Saengkio represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One, Two, Four through Nine, and A through N into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Trish Parvu was employed by Wal-Mart as the full-time Deli Department Manager at the employer's Sioux City store from April 2008 until May 28, 2010, when Assistant Manager Mai Saengkio discharged her from the employment. Ms. Saengkio had become Ms. Parvu's immediate supervisor three months before Ms. Parvu separated from the employment.

The final incident that triggered discharge concerned notes Ms. Parvu kept in a binder in her work area. Ms. Parvu was required to maintain records concerning employee performance, management issues, order changes, and other matters related to deli operations. Toward the end of the employment, Ms. Parvu was being harassed by two female deli employees, Charlotte and Kim. Ms. Parvu was supposed to be the employees' immediate supervisor. The two employees called Ms. Parvu a bitch and a lesbian and engaged in other conduct that undermined Ms. Parvu's authority as Deli Department Manager. Toward the end of the employment, Ms. Parvu notified her superiors that she wanted the employer to address the harassment issues. Ms. Parvu made the mistake of making notes in her department binder concerning the harassment she was experiencing and the employees involved. The two employees in question reviewed Ms. Parvu's notes in the binder and provided the binder to Assistant Manager Mai Saengkio. Ms. Saengkio concluded that Ms. Parvu had violated the employer's confidentiality policy by including the notes concerning the harassment in the binder she kept to track deli department matters. Ms. Saengkio did not believe Ms. Parvu intended to violate Wal-Mart policy by keeping the notes. Based on prior, unrelated

discipline matters, Ms. Saengkiio concluded that Ms. Parvu was subject to discharge from the employment and ended the employment.

The prior matters that moved Ms. Parvu along the employer's progressive discipline process concerned reprimand issued on January 2009, December 2009, and April 2010. The January 2009 reprimand concerned Ms. Parvu taking a 29-minute break. Ms. Parvu was authorized to take only a 15-minute break. Ms. Parvu had combined two breaks and skipped another 15-minute break the same day. Ms. Parvu did not repeat the behavior after being reprimanded. The December 2009 reprimand was based on attendance matters. The most recent attendance matter that factored in that reprimand occurred on December 23, 2009. The employer witness was unable to provide details concerning that matter. The April 23, 2010 reprimand concerned malfunction of and damage to a cooler. Ms. Parvu was responsible for ensuring the cleanliness of the deli department. A cooler malfunctioned, and Freon spilled out, when a cooler's refrigerant coils became encased in ice and were damaged as Ms. Parvu or someone else attempted to remove the ice.

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 fails to establish misconduct in connection with the final incident that triggered the discharge. The weight of the evidence indicates that Ms. Parvu made a good-faith error in judgment when she documented in the department operations binder her personal thoughts concerning the harassment she was experiencing. Given the strained relationship between Ms. Parvu and the two employees in question, a reasonable person would have foreseen further attempts to undermine Ms. Parvu's position, would have anticipated the employees' snooping through the binder, and would have kept the information elsewhere. Ms. Parvu's failure to demonstrate such insight was no more than a good-faith error in judgment and involved no intention whatsoever to run afoul of the employer's policies. Because the evidence fails to establish a final, current act of misconduct, the administrative law judge need not further consider the prior, unrelated reprimands. See 871 IAC 24.32(8).

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

DECISION:

The Agency representative's June 18, 2010, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw