

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CULLEN KRON**  
Claimant

**APPEAL NO: 10A-UI-16313-BT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**  
Employer

**OC: 09/12/10**  
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

Wal-Mart Stores, Inc. (employer) appealed an unemployment insurance decision dated November 10, 2010, reference 02, which held that Cullen Kron (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 19, 2011. The claimant participated in the hearing. The employer participated through Dennis Purcell, Store Manager and Thomas Howell, Assistant Manager. Employer's Exhibits One through Three were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

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

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired full-time on November 21, 2001 as a full-time overnight support manager. He was promoted to a produce manager and has most recently worked as a DSE Reclamation Associate, in which he helped check in service vendors and scanned out damaged merchandise throughout the facility. In his nine years of employment, he only received one verbal warning for performance in 2008 because he did not have the produce section full at 9:00 a.m.

The claimant arrived late to work on August 16, 2010. He was scheduled to arrive at 5:00 a.m. but did not arrive until 5:38 a.m. The claimant immediately went to his area of work and started working. At some point after that, he contacted a member of management and reported that he did not have his badge. The claimant went to the time cards and documented that he arrived at 5:15 a.m. instead of the actual time he arrived.

The employer became aware of this fact and confirmed the information by viewing surveillance video. The claimant was questioned on August 18, 2010 about it and he admitted he put in the

incorrect time of 5:15 a.m. so that it would not appear that he was tardy. The employer does not consider an employee tardy if they arrive within 15 minutes of their scheduled shift. The claimant knew what he did was wrong but he wanted a perfect record and he had overslept that morning. The employer forwarded the information to the corporate office and the claimant had to wait on their decision.

The employer's timekeeping integrity policy provides that the falsification of time records is strictly prohibited and may subject the employee to disciplinary action up to and including termination. The employer testified that the general rule is that if the time falsification is over 20 minutes, the employee is discharged but if it is under 20 minutes, the employee may get a warning. The claimant falsified his time by 23 minutes. He waited and waited for an answer from the corporate office and the store manager was not available so the claimant asked another manager what was going to happen to him. The manager told him, "More than likely if you're still here after two weeks, you're fine." That was not the case and the employer discharged the claimant on September 8, 2010.

### **REASONING AND CONCLUSIONS OF LAW:**

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

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.

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 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). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988).

The claimant was discharged on September 8, 2010 for falsification of time records on August 16, 2010. He admitted he falsified his time card by 23 minutes and acknowledged it was wrong. Reportedly, if he had falsified his time card for only 19 minutes, he would have been warned and not discharged. The claimant had only received one verbal warning for performance during his nine years of employment. Additionally, the employer discharged the claimant over three weeks after the fact.

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge or disciplinary suspension for misconduct cannot be based on such past act(s). The termination or disciplinary suspension 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). Inasmuch as the employer has not established a current or final act of misconduct, benefits are allowed.

#### **DECISION:**

The unemployment insurance decision dated November 10, 2010, reference 02, is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

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Susan D. Ackerman  
Administrative Law Judge

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Decision Dated and Mailed

sda/pjs