

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MICHELE MATLAGE**

Claimant

**APPEAL NO: 11A-UI-13426-BT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**

Employer

**OC: 09/04/11**

**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 September 27, 2011, reference 01, which held that Michele Matlage (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 November 22, 2011. The claimant participated in the hearing. The employer participated through Jeff Bower, assistant manager. Employer's Exhibits One through Six 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 claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was employed as a full-time food merchandise supervisor from January 28, 2008 through September 6, 2011. She was discharged for insubordination as a result of her failure to provide a plan of action after a decision day. The employer's progressive disciplinary policy includes a verbal warning, a written warning, and a decision-making day before termination. A decision-making day results in a one-day paid suspension and the employer must provide a plan of action as to how they plan to improve the behavior that resulted in the decision day.

The claimant received a verbal warning on April 2, 2011 for being disrespectful to a superior on the walkie-talkie. She received a written warning on May 24, 2011 for improperly using her discount card. The claimant was counseled on August 30, 2011 for not completing the assigned work. She has daily tasks she must complete, but the new manager, who had been in place for less than six months, also assigned extra daily lists for employees to complete. When the claimant reported to work on August 30, 2011, she knew she was physically incapable of completing all the tasks assigned to her, so she asked management which tasks had priority.

The employer told her that there were others working on the aisles to which she was assigned so to do the best she could. At the end of the day, she was called to the office and counseled because she did not complete all the work. She was shocked, because she did not know what else she could have done.

The employer told the claimant on August 31, 2011 that she was getting a decision-making day. The claimant was suspended on September 2, 2011 and her next work day was September 5, 2011, but she called in her absence due to illness. She returned to work on September 6, 2011 and the employer asked for her plan of action. The claimant had not prepared one, because she did not know what to put down. She even asked the assistant manager what she should put down because she was working as hard as she could and he told her that he could not advise her as to what to put in her plan of action. The claimant did not know what to write and did not feel she could lie on the document, so she did not complete a plan of action. She expected to be demoted but did not dream she would be terminated, since she had worked there three years without any disciplinary problems. However, the claimant was discharged that day.

### **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 6, 2011 for failing to write a plan of action after a decision making day. Misconduct must be substantial in nature to support a disqualification from unemployment benefits. *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1982). The focus is on deliberate, intentional, or culpable acts by the employee. *Id.* The claimant did not write a plan of action because she did not know what to write, because she was working as hard as she could. The employer has not met its burden. Work-connected misconduct as defined by the unemployment insurance law has not been established in this case and benefits are allowed.

**DECISION:**

The unemployment insurance decision dated September 27, 2011, reference 01, 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/kjw