

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

EMMA I FIGUEROA
Claimant

APPEAL NO. 09A-UI-01750-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

**OC: 12/21/08 R: 04
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Wal-Mart Stores (employer) appealed a representative's January 21, 2009 decision (reference 01) that concluded Emma Figueroa (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for February 25, 2009. The claimant provided a telephone number for the hearing. The administrative law judge called the number and the claimant participated personally. The employer participated by Raymond Scott, Co-manager. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

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 hired on August 31, 2004, as a full-time photo lab technician. The claimant signed for receipt of the employer's Orientation Checklist and Coaching for Improvement Policy on August 31, 2004. The Policy indicates that an employee may be disciplined or terminated for unauthorized use of company time or personal business on company time. The employer did not want an employee to develop their own pictures at work but did not inform employees of this desire. The employer issued the claimant four warnings for attendance issues.

The claimant's department manager and her co-worker developed their own pictures at work when all other work was completed. The developed pictures were filed in the drawer and the employee paid for them after work hours. The claimant did this a few times also.

On December 12, 2008, the assistant manager asked the claimant about the pictures. The claimant openly stated she was developing her own pictures because all other work was done. She asked him if there was something else she should be doing. He said there was not. The employer then terminated the claimant for developing her own pictures. She did not know this was wrong.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged for misconduct.

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 establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). 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 Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Repeated failure to follow an employer's instructions in the performance of duties is misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). The employer did not provide sufficient evidence of job-related misconduct. The claimant's failure to follow a non-stated instruction is not misconduct. The claimant cannot be held responsible for not knowing rules that the employer does not post, publish, or verbalize. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's January 21, 2009 decision (reference 01) is affirmed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/kjw