IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

CARLA F JOHNSON Claimant **WAL-MART STORES INC** Employer	**APPEAL 15A-UI-09054-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/12/15** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 4, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 14, 2015. Claimant participated and through her attorney, John Singer. Beverly Rice testified on behalf of claimant. Employer participated through assistant manager, Megan Schlemmer, hearing representative, Thomas Kuiper, and asset protection manager, Richard Ewoldt. Employer Exhibit One was admitted into evidence with no objection. It is noted that the arrow on Employer Exhibit One was added for the purposes of the September 14, 2015 hearing and was not on the original e-mail. Employer Exhibit Two was admitted into evidence with no objection.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as an accounting associate from July 6, 1993, and was separated from employment on July 16, 2015, when she was discharged.

Claimant was discharged for working off the clock. Claimant was observed working after having punched out and prior to punching in. The employer has a rest breaks, meal period and days of rest policy that requires employees to take fifteen minute breaks after working for a certain period of time and to take a meal break after working for a certain period of time. Employer Exhibit Two. Employees are to take their breaks outside of the work area and not perform work while on their break. Employer Exhibit Two. Employees have asked claimant to perform work after she had already punch out for her break on prior occasions.

On July 4, 2015 or July 5, 2015, the employer's time keeping system flagged claimant's time cards for review because of manual time adjustments that were made. There is a system in place that after a certain number of manual adjustments, an employee's time card is flagged. After claimant's time card was flagged, Mr. Ewoldt began an investigation. Mr. Ewoldt reviewed

in-store video of the time clock adjustments and reviewed what claimant was doing during those time periods. Mr. Ewoldt reviewed the three most recent time adjustments, July 1, 2, and 3, 2015. Employer Exhibit Two. Mr. Ewoldt observed that claimant was not taking the required fifteen minute breaks away from her work area and worked during her lunch punch out. After July 3, 2015, there were no instances flagged by the time system for claimant's time card. The employer met with claimant between July 10, 2015 and July 15, 2015 regarding the break policy and told her she was under investigation.

On April 16, 2015, Ms. Schlemmer had a discussion with claimant about taking her breaks at her desk and working. Employer Exhibit One. This discussion was not considered a written warning or a coaching. Claimant did not receive any warnings prior to being discharge for violating the employer's rest breaks, meal period and days of rest policy. Claimant did receive prior warnings (coachings) for: attendance (third written warning on May 28, 2015 and first written warning for attendance on March 7, 2015) and for job performance and productivity (second written warning on April 10, 2015). The employer has a disciplinary policy that provides for three written coachings prior to termination. Employer Exhibit One.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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.

Iowa Admin. Code r. 871-24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. 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. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. 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." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986).

Claimant had received three prior written warnings in 2015. Employer Exhibit Two. These warnings were for attendance and job performance/productivity. Employer Exhibit Two. The employer's argument that because claimant had received three prior written warnings, pursuant to their policy the next violation for any conduct disqualifies claimant from unemployment benefits is unpersuasive. In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the incident under its policy.

The employer has shown that claimant failed to properly follow their rest breaks, meal period and days of rest policy on three consecutive days (July 1, 2, and 3, 2015). Employer Exhibit Two. However, there were no violations after those three days, even though claimant was not informed of the investigation until approximately a week later. Furthermore, claimant had never received a warning about violating the rest breaks, meal period and days of rest policy.

The conduct for which claimant was discharged was merely an isolated incident of poor judgment and inasmuch as employer had not previously warned claimant about the issue leading to the separation (rest breaks, meal period and days of rest policy), it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. A warning for attendance or job performance/productivity is not similar to not properly taking the required breaks and the employer's simple accrual of a certain number of warnings counting towards discharge does not establish repeated negligence or deliberation

and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits. Benefits are allowed.

DECISION:

The August 4, 2015, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

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