

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**ROSALIE J ZELLER**  
Claimant

**APPEAL NO. 19A-UI-02094-JT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WALMART INC**  
Employer

**OC: 02/10/19**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Rosalie Zeller filed a timely appeal from the March 1, 2019, reference 01, decision that held the claimant was disqualified for benefits and the employer's account would not be charged for benefits, based on the deputy's conclusion that the claimant was discharged on February 21, 2019 for violation of a known company rule. Ms. Zeller requested an in-person hearing. After due notice was issued, an in-person hearing was held at the Waterloo IowaWORKS center on April 8, 2019. Ms. Zeller participated. Lee LaCombe represented the employer. The administrative law judge took official notice of the documents submitted for and generated in connection with the February 28, 2019 fact-finding interview.

**ISSUE:**

Whether the claimant 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: Rosalie Zeller was employed by Walmart as a part-time cashier from 2009 until January 21, 2019, when Assistant Manager Lee LaCombe discharged her from the employment for violating Walmart policy regarding sale of age-restricted products. On January 11, 2019, the United States Food and Drug Administration (FDA) conducted a compliance check inspection/sting operation at the Independence Walmart where Ms. Zeller worked. At that time, Ms. Zeller sold an age-restricted item, a cartridge containing a nicotine-based liquid for use in an e-cigarette device, to a person under the legal age to purchase such items. Walmart's written policy regarding sale of age-restricted products required that Ms. Zeller confirm the age of anyone who appeared younger than 40 years old. Ms. Zeller had undergone training in Walmart's policy regarding sale of age-restricted products several times during the course of her employment and was well familiar with the policy. The person to whom Ms. Zeller sold the age-restricted product appeared to Ms. Zeller to be in his teens or early 20s. The under-aged customer had to request the age-restricted product from Ms. Zeller at the checkout register and Ms. Zeller had to obtain the product for the customer from a secured area. When Ms. Zeller scanned the product to ring it up, her cash register prompted her to confirm the customer's age by checking his ID. Ms. Zeller

bypassed that process and pushed a button on her register to indicate that the customer was in the 40 and over age range. The customer then left with the age-restricted tobacco product.

On January 18, 2019, the FDA notified the Independence Walmart of the failed compliance check inspection and warned of potential consequences to the employer as a result of the failed inspection. Assistant Manager Lee LaCombe investigated the matter and determined that Ms. Zeller had handled the transaction. In reviewing surveillance records and the transaction record, Mr. LaCombe determined that the customer appeared to be in his teens. Contrary to Ms. Zeller's later assertion that her line had been backed up at the time of the sale, Mr. LaCombe's review of the surveillance record indicated that was not the case. Under Walmart's age-restricted product policy, an employee found to have violated the policy was subject to discipline up to and including discharge from the employment. On January 21, 2019, Mr. LaCombe notified Ms. Zeller that she was discharged from the employment based on her violation of the age-restricted product policy.

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

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

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 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).

The weight of the evidence in the record establishes that Ms. Zeller knowingly violated the employer’s policy regarding age-restricted products. Ms. Zeller had a number of opportunities to comply with the policy during the January 11, 2019 transaction, but elected not to comply with the policy. Ms. Zeller’s intentional disregard of the policy was against the law, subjected the employer to potential regulatory sanction, and was a substantial disregard of the employer’s interests. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Zeller was discharged for misconduct. Accordingly, Ms. Zeller is disqualified for benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. Ms. Zeller must meet all other eligibility requirements. The employer’s account shall not be charged for benefits.

**DECISION:**

The March 1, 2019, reference 01, decision is affirmed. The claimant was discharged for misconduct in connection with the employment. The discharge was effective January 21, 2019. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The employer’s account shall not be charged for benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs