

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHARLES J MICHAELSON
Claimant

APPEAL NO. 10A-UI-14098-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 08/15/10
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 29, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 3, 2010. Claimant participated personally and was represented by attorney Emilie Roth Richardson. Chris Scheibe of TALX represented the employer and presented testimony through Jeri Barnhart, Brian Havlovick, and Tobi Hemming. Exhibits Two through Eight were received into evidence.

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: the claimant was employed as a full-time on loader from 2005 until August 19, 2010, when the employer discharged him in connection with a workplace accident that occurred on August 17, 2010. In the course of performing his duties, the claimant walked backwards in a narrow space between pallets of merchandise, hit his foot on a rail, and injured his knee. The claimant reported the injury to supervisor right away and told supervisor he thought he might need to see a doctor. The claimant spoke to a supervisor about possibly leaving work early due to the injury, was told by the supervisor at the absence would count against him, and elected to complete the shift. After the claimant finished work, the claimant's knee continued to hurt and the claimant sought treatment at an emergency room. The emergency room contacted the employer and an employer representative provided the hospital with a drug test kit for the claimant to complete. Claimant was released to return to work on light-duty status. Claimant met with a human resources representative to complete the appropriate paperwork.

The employer subsequently notified the claimant that he was being discharged due to unsafe work practices. The claimant had previously suffered injury in the course of performing his duties. These included an injury to his foot in September 2009 and other injuries in 2006 and 2008.

REASONING AND CONCLUSIONS OF LAW:

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 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). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly

be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The weight of the evidence in the record fails to establish negligence or carelessness in connection with the final incident that prompted the discharge. The weight of the evidence also fails to establish any intentional violation of workplace safety rules or any other policy in connection with the final incident. The weight of the evidence indicates instead that the claimant was simply maneuvering within a narrow space between two pallets at the time he was injured. The evidence fails to establish any carelessness, negligence, or intentional misconduct in connection with the claimant's trip to the emergency room after the employer discouraged him from leaving during a shift. In short, the evidence fails to establish a current act of misconduct in connection with the employment necessary to disqualify the claimant for unemployment insurance benefits. The employer has presented insufficient evidence to establish a pattern of carelessness or negligence in connection with the unsafe work practices allegation.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the claimant was discharged for no disqualifying reason. Accordingly, the claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

DECISION:

The Agency representative's September 29, 2010, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw