

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRIAN C ARROWOOD

Claimant

APPEAL NO. 09A-UI-10690-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

**Original Claim: 06/14/09
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge for Misconduct

Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc. filed a timely appeal from a representative's decision dated July 13, 2009, reference 01, which held the claimant eligible to receive unemployment insurance benefits. After due notice was issued, a telephone hearing was scheduled for and held on August 11, 2009. The claimant participated personally. The employer participated by Mr. Brian Rehnolt, co-manager.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered the evidence in the record, finds: Brian Arrowood was employed by Wal-Mart Stores, Inc. from October 2007 until June 8, 2009, when he was discharged for insubordination. The claimant held the position of full-time unloader and was paid by the hour. On June 8, 2009, the claimant was called to Mr. Rehnolt's office because of complaints from other employees that Mr. Arrowood had been threatening to quit and acting inappropriately. Mr. Rehnolt wished to address the allegations with the claimant. When Mr. Rehnolt asked the claimant if he had been making statements that he "wanted to get fired," the claimant responded in the affirmative. When Mr. Rehnolt inquired why, Mr. Arrowood responded by directing a vile and inappropriate statement to the company's co-manager. The claimant then stated, "You heard me," and repeated the inappropriate, vile statement. Based upon the claimant's conduct during the meeting and a previous warning that had been issued to him on September 28, 2008, for the use of inappropriate language, a decision was made to terminate Mr. Arrowood from his employment with Wal-Mart Stores, Inc.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record is sufficient to warrant the denial of unemployment insurance benefits. It is.

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 evidence in the record establishes that the claimant had been warned in September 2008 for using vulgar and inappropriate language in the presence of other employees. Mr. Rehnolt, the company co-manager, testified under oath that on June 8, 2009, when the claimant was called in for counseling, that Mr. Arrowood confirmed that he had been making statements that he wished to be fired from employment and that the claimant then stated, "Fuck you," to the co-manager. Mr. Rehnolt further testified that Mr. Arrowood then repeated the inappropriate epithet, whereupon he was discharged from employment. The claimant in turn testified that he was summarily discharged from employment and directed the vile epithet to Mr. Rehnolt after his discharge.

The administrative law judge, having heard the testimony of the witnesses and having considered the hearing record and the demeanor of the parties, finds the employer's testimony to be more credible. The claimant had been previously specifically warned for similar conduct and was discharged when he repeated the inappropriate conduct in the presence of the company's co-manager.

"The use of profanity or offensive language in a confrontational, disrespectful or name-calling context may be recognized as misconduct even in the case of isolated instance or situations in which the target of the abusive name-calling is not present when the vulgar statements are initially made." Myers v. Employment Appeal Board, 462 N.W.2d 734 (Iowa App. 1990).

For the reasons stated herein, the administrative law judge concludes the claimant's conduct rose to the level of disqualifying misconduct in connection with his employment. Benefits are withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The issue of whether the claimant must repay the unemployment insurance benefits he has received is remanded to the Unemployment Insurance Services Division for determination.

DECISION:

The representative's decision dated July 13, 2009, reference 01, is reversed. Brian Arrowood is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount in insured work, provided he is otherwise eligible. The issue of whether the claimant must repay the unemployment insurance benefits he has received is remanded to the Unemployment Insurance Services Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw