

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

SARAH A ERBES
5824 S 100TH PLZ #3A
OMAHA NE 68127-3151

WAL-MART STORES INC
C/O TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-04012-CT
OC: 03/12/06 R: 01
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc. filed an appeal from a representative's decision dated March 29, 2006, reference 01, which held that no disqualification would be imposed regarding Sarah Erbes' separation from employment. After due notice was issued, a hearing was held by telephone on April 25, 2006. Ms. Erbes participated personally. The employer participated by Diane Lavender, Customer Service Manager; Jan Coon, Store Manager; and Nicole Hoyer, Assistant Manager.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Erbes was employed by Wal-Mart from October 26, 2004 until March 10, 2006 as a full-time sales associate. The decision to discharge was based on a customer complaint received on March 9, 2006. The customer complained to Diane Lavender that an associate in the jewelry department was using inappropriate language. The customer described the associate as the "blonde girl in jewelry." It was determined that Ms. Erbes was the only jewelry associate fitting this description. The customer would not repeat what she overheard Ms. Erbes say. It was also reported on March 9 that she had used profanity in talking with a coworker in the presence of a customer. It was reported that she had stated, "I hate those fucking twins." Ms. Erbes denied using the term "fucking" when confronted by the employer. She was notified of her discharge on March 10, 2006.

In making the decision to discharge, the employer also considered prior warnings received by Ms. Erbes. On November 3, 2005, she received a written warning as a result of a transaction involving a voucher from the Women, Infants, and Children Feeding Program (WIC). The voucher was for ten cans of formula but Ms. Erbes only sold the customer eight cans. The total amount of the voucher cannot exceed \$100.00. If she had sold the customer ten cans of formula, it would have exceeded \$100.00. Ms. Erbes received a verbal warning on June 7, 2005 because of a customer complaint. She initially told the customer she could not mix the paint color desired. The customer insisted that it be mixed and Ms. Erbes told her she would have to pay for it even if it was not the color she wanted. The customer also reported that Ms. Erbes suggested that the customer should be the one mixing the paint.

REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Ms. Erbes was separated from employment for any disqualifying reason. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer cited complaints from March 9 as the precipitating factor in Ms. Erbes' discharge. It is unclear from the employer's evidence as to whether there was one incident or two on March 9. At any rate, the customer who complained to Ms. Lavender did not disclose what Ms. Erbes said. Therefore, there was no evidence of misconduct with respect to what the customer reported. Someone else reported that Ms. Erbes made reference to "those fucking twins," an allegation she denied. If it did occur, it was, at most, a single "hot-headed" incident.

Ms. Erbes did receive a written warning in November. However, it appears that she was attempting to honor the restrictions on the WIC voucher by not allowing the customer to purchase more than \$100.00 worth of merchandise. She also received a verbal warning in July of 2005 after a customer complained. The employer's hearsay testimony does not overcome Ms. Erbes' sworn denial that she acted inappropriately with the customer who wanted paint mixed.

After considering all of the evidence and the contentions of the parties, the administrative law judge concludes that the employer has failed to satisfy its burden of proving disqualifying misconduct. While the employer may have had good cause to discharge, conduct that might warrant a discharge from employment will not necessarily support a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa 1983).

The evidence failed to establish that Ms. Erbes deliberately and intentionally acted in a manner she knew to be contrary to the employer's standards or interests. Although Ms. Erbes may have been an unsatisfactory employee, there was no willful or wanton disregard of the employer's standards. For the above reasons, benefits are allowed.

DECISION:

The representative's decision dated March 29, 2006, reference 01, is hereby affirmed. Ms. Erbes was discharged but disqualifying misconduct has not been established. Benefits are allowed, provided she satisfies all other conditions of eligibility.

cfc/pjs