

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DOUGLAS E KOLKMAN
Claimant

APPEAL NO. 10A-UI-03263-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

**Original Claim: 01/31/10
Claimant: Appellant (2)**

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated February 24, 2010, reference 01, which held the claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on April 15, 2010. The claimant participated. The employer participated by Diane Barton, human resources manager. The record consists of the testimony of Diane Barton; the testimony of Douglas Kolkman; and Employer's Exhibits 1 through 6.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a distribution center located in Mt. Pleasant, Iowa. The claimant was a full-time receiver/un-loader. He was a full-time employee and this particular stint of employment had begun on August 20, 2003. The job of a receiver/un-loader is to unload semi-trucks of merchandise that has come in from vendors and place it on conveyer belts that go to the order and shipping area. There are production goals that must be met by each employee.

The incident that led to the claimant's termination occurred in the early morning hours of February 3, 2010. The particular shift had started on February 2, 2010. Each un-loader is assigned to a particular zone in the warehouse. Each zone has a number. When an un-loader finishes his or her zone, he or she is required to move forward to the next zone. The claimant was assigned to Zone 11. Another employee, Randy, was working on Zone 9. Zone 9 had some "hard" items to unload. For unknown reasons, Randy left Zone 9 before he was finished and went to Zone 12, which had small boxes that were easier to handle.

There was also a problem that night with some cases of candles. For some reason, the labels printed did not match the freight. The claimant was short ten or twenty labels, so he put the

candles aside and told Randy that some of the freight might be in his area. A short time later, the claimant approached Randy about the merchandise. Instead of answering, Randy walked away to talk with a friend. The claimant was frustrated and said, "Dumb ass." There was no one within ten feet of the claimant, and he used his normal conversation voice. He did not believe that anyone heard him.

This incident was reported to human resources and an investigation was conducted. The employer concludes that the claimant had used profanity to verbally abuse another employee and had improperly moved to another work area. The claimant had had three previous disciplines for productivity and safety. Because the claimant was now at the fourth step of discipline, he was terminated. The employer has a policy against profanity in the workplace.

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988). Profanity or other offensive language in a confrontational or disrespectful context may constitute misconduct, even in isolated situations or

in situations in which the target of the statements is not present to hear them. See Myers v. EAB, 462 N.W.2d 734 (Iowa App. 1990). The legal definition of misconduct excludes errors of judgment or discretion in isolated situations. The employer has the burden of proof to show misconduct.

The claimant was discharged for using the words “dumb ass” in the workplace. The claimant was frustrated because another employee had walked away from him when the claimant was trying to straighten out a problem with some of the merchandise that had been unloaded that evening. The claimant testified that while he used his normal conversation voice, he did not direct the words at anyone and he did not think anyone could hear them. Who heard those words is unknown, as the employer elected not to have the employees who were actually present testify at the hearing.

The words “dumb ass” are clearly not appropriate in the workplace. However, the administrative law judge concludes that, in this situation, the claimant’s actions are not misconduct. The phrase was not uttered in a confrontational context but rather stemmed from frustration. The claimant used poor judgment in venting his frustration in this manner. In reviewing the other disciplinary actions given to the claimant, there is nothing to indicate that this type of behavior was a pattern. The administrative law judge concludes that the claimant’s language was an error of judgment in an isolated situation. The employer has not established misconduct. Benefits are allowed.

DECISION:

The representative’s decision dated February 24, 2010, reference 01, is reversed. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw