

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

JASON G ZANDER
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ST LOUIS MO 63166-0283

WAL-MART STORES INC
c/o CO-MANAGER ANDY
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Appeal Number: 05A-UI-05080-DWT
OC: 03/27/05 R: 03
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

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc. (employer) appealed a representative's May 2, 2005 decision (reference 01) that concluded Jason G. Zander (claimant) was qualified to receive unemployment insurance benefits and the employer's account was subject to charge because the claimant had been discharged for disqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 3, 2005. The claimant participated in the hearing. Andy Fossleman, a co-manager, appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on September 16, 2003. He worked as a dairy stocker on the overnight shift. The claimant's supervisors were Jon Jacobson and John Campbell.

During the course of his employment, the claimant received a number of written warnings for various problems. Based on the employer's progressive discipline on January 13, 2005, the employer gave the claimant a decision day. The decision day is the employer's final disciplinary step before an employee is discharged. The claimant received the January 13 warning for being inconsiderate to another employee. The claimant made a comment about a co-worker during a break that was not flattering.

There were no problems the employer knew about until March 29, 2005. A co-worker, B., reported that during the early morning hours on March 28, the claimant came up to him very upset and said, "Where's my f... guns and ammunition." After B. reported this incident, the employer learned the claimant had asked another employee, A.E., how he got ammunition for his guns. A.E. was a hunter. A female employee, K.B., told the employer that she thought the claimant followed her home because he made the comment that he had seen her kissing someone. The employer obtained statements from other employees about the claimant's behavior, conduct and comments. Based on the statements from several employees, the employer decided the claimant created a hostile work environment by his actions and comments.

On March 31, 2005, Jacobson discharged the claimant for creating a hostile work environment for his co-workers. The employer did not ask the claimant about any of the reports his co-workers had made.

REASONING AND CONCLUSIONS OF LAW:

On the hearing notice the issue of whether the employer filed a timely appeal was noted. The administrative law judge did not address this issue with the parties because the record showed the employer's representative faxed the appeal letter on May 12, 2005. May 12 was the last day to appeal. Even if the Appeals Section did not print out the faxed appeal letter until May 13, the date on the faxed copy shows May 12. Based on the record, the employer filed a timely appeal. The Appeals Section made a mistake by indicating timeliness of an appeal was an issue for the hearing when it was not. Since the employer filed a timely appeal, the Appeals Section has legal jurisdiction to address the merits of the employer's appeal.

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code §96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The employer established compelling business reasons for discharging the claimant. Based on the number of employee complaints, the employer had no choice but to discharge the claimant. For unemployment insurance purposes, however, the employer has the burden to establish that the claimant committed work-connected misconduct.

When an interested party has a person represent the employer who has no personal knowledge about incident(s) that resulted in a discharge, that person is handicapped because they must rely on statements from other people. The interested party is further handicapped when no one with personal knowledge testifies at the hearing. The employer's witness had to rely on reports from other employees. As a result, the claimant's testimony must be given more weight than the employer's reliance on statements and reports from employees who did not testify at the hearing. It is difficult to believe that all the employees who submitted reports to the employer were untruthful. The claimant denied making the comments these employees attributed to him. Without one of the employees testifying about the claimant's comments and conducts, the employer's hearsay information is not supported by any reliable evidence. Even though the employer had previous problems with the claimant, none of the prior warnings had anything to do with creating a hostile work environment. In this case, the claimant's testimony must be given more weight than the employer's reliance on unsupported hearsay information from employees who did not testify at the hearing.

Other than B's report about guns and ammunitions, the employer does not know when the reported incidents occurred or why employees did not report problems prior to May 29. While the employer may have had business reasons, it is troublesome that the employer did not ask the claimant about any of the reported problems prior to discharging him. Based on a preponderance of the credible evidence, the claimant did not commit a current act of work-connected misconduct for unemployment insurance purposes. (If the evidence established the employees' reports were accurate, especially B's report, the claimant would have committed work-connected misconduct.) The claimant is qualified to receive unemployment insurance benefits.

DECISION:

The representative's May 2, 2005 decision (reference 01) is affirmed. The employer discharged the claimant for compelling business reasons that do not constitute work-connected misconduct. As of March 27, 2005, the claimant is qualified to receive unemployment insurance benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

dlw/pjs