

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GARY E LIST

Claimant

APPEAL NO. 13A-UI-00415-JT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 12/09/12

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Gary List filed a timely appeal from the January 9, 2013, reference 01, decision that denied benefits. Mr. List requested an in-person hearing. After due notice was issued, an in-person hearing was held on February 26, 2013. Mr. List participated. Assistant Manager Laetitia Vopava represented the employer. Exhibits One through Five and A were received into evidence.

ISSUE:

Whether Mr. List was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Gary List was employed by Wal-Mart as a part-time unloader from 2007 until December 7, 2012, when Co-Manager Dewayne Stuve discharged him from the employment. Assistant Manager Laetitia Vopava carried out the discharge. The incident that triggered the discharge occurred on December 1, 2012. On that day, Mr. List was walking through the employer's stockroom, carrying a box of motor oil in one arm and a handheld computer with his opposing hand, when he found his path blocked by a cart. Mr. List was afraid he would drop the box of motor oil. Mr. List hoisted the box of motor oil on to the cart to keep from dropping it. Mr. List did not see anyone in the vicinity. Mr. List made an unfriendly comment. A female coworker overheard the comment, interpreted it as a comment against her, and reported the comment to a supervisor. The supervisor did nothing to further investigate the matter. Instead, the supervisor reported the incident up the chain of command as disrespectful and/or harassing conduct on the part of Mr. List toward the coworker in violation of Wal-Mart policy. On December 5, Mr. Stuve directed Ms. Vopava to discharge Mr. List from the employment when he arrived for his next shift. On December 7, Ms. Vopava discharged Mr. List from the employment. Though the decision to discharge Mr. List had already been made, Ms. Vopava questioned Mr. List about the incident. Mr. List admitted to hollering when his way was blocked by the cart. At some point, the employer directed Mr. List to apologize to the coworker and Mr. List complied.

In making the decision to discharge Mr. List from the employment, the employer also considered concerns about Mr. List's work performance. Mr. List had to use the handheld computer to perform his duties. Mr. List sometimes encountered problems with the handheld computer, which would sometimes malfunction. The employer spoke to Mr. List on more than one occasion about not being as productive as the employer wanted him to be. Mr. List performed his duties to best of his ability, but sometimes did not perform to the employer's satisfaction.

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).

An employer has the right to expect decency and civility from its employees. 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 incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made. The question of whether the use of improper language in the workplace is misconduct is nearly always a fact question. It must be considered with other relevant factors, including the context in which it is said, and the general work environment. See Myers v Employment Appeal Board, 462 N.W.2d 734, 738 (Iowa Ct. App. 1990).

The employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence to establish misconduct in connection with the employment. The employer witness at the appeal hearing was not present for the incident on December 1. The employer presented no testimony from the coworker who was the only other person present for the incident or from the supervisor to whom the coworker reported the matter. The employer witness did not know what Mr. List allegedly uttered on December 1 to prompt the coworker's complaint. The employer had the ability to present more direct and satisfactory evidence, but did not. Given the employer's failure to present sufficient evidence to establish misconduct in connection with the final incident that triggered the discharge, the evidence fails to establish a current act of misconduct. In the absence of a current act of misconduct, there would be no basis for a finding of misconduct in connection with the employment that would disqualify Mr. List for unemployment insurance benefits. In the absence of a current act, there would be no need to consider allegations concerning prior incidents.

The employer also failed to present sufficient evidence to prove misconduct in connection with the concerns about Mr. List's productivity. The weight of the evidence establishes that Mr. List performed his duties to the best of his ability, but sometimes fell short of the employer's expectations. Mr. List's failure to perform to the employer's satisfaction did not constitute misconduct.

Mr. List was discharged for no disqualifying reason. Mr. List is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

DECISION:

The Agency representative's January 9, 2013, reference 01, decision is reversed. 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/tll