IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TIMOTHY L MC DONALD
Claimant

WAL-MART STORES INC
Employer

APPEAL NO: 142A-UI-04225-DWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/16/14
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge
871 IAC 26.14(7) – Request to Reopen Hearing

PROCEDURAL STATEMENT OF THE CASE:

The employer appealed a representative's April 9, 2014 determination (reference 01) that held the claimant qualified to receive benefits and the employer's account subject to charge because the claimant had been discharged for nondisqualifying reasons. The claimant responded to the hearing notice, but did not answer his phone when he was called for the May 12 hearing. Emily Peterson, a shift manager, and Dean Wilson appeared on the employer's behalf at the hearing.

After the hearing had been closed and the employer had been excused, the claimant called about 1:00 p.m. for the 10:30 a.m. hearing. He requested that the hearing be reopened. Based on the evidence, the arguments of the parties, and the law, the administrative law judge denies the claimant's request to reopen the hearing but finds him qualified to receive benefits.

ISSUES:

Did the claimant establish good cause to reopen the hearing?

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

FINDINGS OF FACT:

The claimant started working for the employer on September 21, 2013. He worked full time as an inventory associate on the 4:00 p.m. to 1:00 a.m. shift.

During his employment the claimant received warnings about his attendance and using profanity at work. The employer's code of ethics does not allow employees to use profanity at work. The claimant received his first written warning on January 3, 2014 for attendance issues. On January 21, the employer gave the claimant a second written warning for using profanity on the sales floor. The claimant received a third written warning for attendance on February 11, 2014. The third warning informed the claimant that if there were any further issues, the next step in the employer's progressive disciplinary process was termination.

During the claimant's lunch break on March 5, the claimant was in the employee lounge talking to a co-worker. As Peterson walked past the lounge she heard the claimant say that we have to do our work and stock which I think is bullshit. Peterson immediately went to the claimant and asked him to go to office with her. She told the claimant that his language in the employee lounge was not acceptable and she would talk to him after he was done with his lunch break.

Since the claimant had already received his third written warning, the employer discharged him on March 6, 2014, for saying bullshit during his lunch break when he punched out and in the employee lounge. The claimant established a claim for benefits during the week of March 16, 2014.

Hearing notices were mailed to the parties on April 28 informing them a telephone hearing would be held on May 12 at 10:30 a.m. The claimant called in his phone number on May 2, 2014. When the claimant was called for the May 12 hearing, he did not answer his phone. A message was left for him to contact the Appeals Bureau immediately. The claimant forgot about the May 12, 10:30 a.m. hearing. He was running errands and working on his vehicle at the time of the hearing. After the claimant noticed he had a missed call and a message, he called the Appeals Bureau around 1:00 p.m. He requested that the hearing be reopened.

REASONING AND CONCLUSIONS OF LAW:

If a party responds to a hearing notice after the record has been closed and the party who participated at the hearing is no longer on the line, the administrative law judge can only ask why the party responded late to the hearing notice. If the party establishes good cause for responding late, the hearing shall be reopened. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. 871 IAC 26.14(7)(b) and (c). The claimant did not establish good cause for being unavailable for the scheduled hearing. His request to reopen the hearing is denied.

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).

The law defines misconduct as:

> 1. A deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment.
> 2. A deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees. Or
> 3. 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 do not amount to work-connected misconduct. 871 IAC 24.32(1)(a). While past acts

and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act. 871 IAC 24.32(8).

The employer established business reasons for discharging the claimant. Since the claimant had already received three written warnings, one for using profanity on the sales floor and two for attendance issues, the next step in the employer's progressive disciplinary policy was termination. The employer acknowledged that if the claimant had not already received his third written warning, he would not have been discharged for the March 5 incident.

On March 5 the claimant was off the clock and in the employee lounge talking to a co-worker. Peterson concluded the claimant's use of the word "bullshit" violated the employer's code of conduct policy. The claimant's use of this word while expressing frustration with his job amounts to an isolated incident of poor judgment. The claimant did not commit a current act of work-connected misconduct. As of March 16, 2014, the claimant is qualified to receive benefits.

The employer is not one of the claimant's base period employers. During the claimant's current benefit year, the employer's account will not be charged.

DECISION:

The claimant's request to reopen the hearing is denied. The representative's April 9, 2014 determination (reference 01) is affirmed. The employer discharged the claimant for business reasons, but the claimant did not commit a current act of work-connected misconduct. As of March 16, 2014, the claimant is qualified to receive benefits, provided he meets all other eligibility requirements. The employer's account will not be charged during the claimant's current benefit year.

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Debra L. Wise
Administrative Law Judge

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Decision Dated and Mailed

dlw/pjs