

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROBERT L SPINNEY
Claimant

APPEAL NO. 08A-UI-09275-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 09/14/08 R: 02
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Robert L. Spinney (claimant) filed an appeal from a representative's decision dated October 9, 2008, reference 01, which denied benefits based upon his separation from Wal-Mart Stores, Inc (employer). After due notice was issued, a hearing was held by telephone on October 28, 2008. Mr. Spinney participated personally. Participating on his behalf was Mr. Joseph McCombs, community service worker. Although duly notified, the employer failed to respond to the hearing notice and did not participate.

ISSUE:

The issue in this matter is whether the claimant was discharged for intentional disqualifying misconduct in connection with his work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all the evidence in the record, finds: The claimant worked for this employer from May 1997 until September 13, 2008, when he was discharged from employment. Mr. Spinney was employed as a full-time janitorial worker and was paid by the hour.

The claimant was discharged when his action of raising his arm up was misinterpreted as a sign of threatening behavior. Mr. Spinney, who has a learning disability, did not intend to intimidate or be threatening in his action, but only was attempting to fend his way through a crowd at the time.

When initially employed, the claimant was assigned a job coach to assist him and to act as a facilitator with company management. As time progressed, the job coach was eliminated and the claimant began experiencing increasing difficulty, as his actions and intentions were being misinterpreted by management without the assistance of a job coach.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Spinney was discharged for intentional disqualifying misconduct in connection with the employment. It does not.

In this matter, the claimant participated personally and offered sworn testimony, testifying that his intention in raising his arm on the day in question was not to intimidate or threaten but merely a gesture to assist himself through a crowded corridor. In the absence of any testimony to the contrary, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing intentional disqualifying misconduct on the part of the claimant at the time of separation.

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.

For the reasons stated herein, the administrative law judge concludes the claimant was dismissed under non-disqualifying conditions. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

DECISION:

The representative's decision dated October 9, 2008, reference 01, is reversed. The claimant was dismissed under non-disqualifying conditions. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw