

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

JOHNATHON E PEASLEE  
211 W GARFIELD ST  
LAURENS IA 50554

WAL-MART STORES INC  
c/o TALX UC EXPRESS  
PO BOX 283  
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-10669-RT  
OC: 08/29/04 R: 01  
Claimant: Respondent (2)

**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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct  
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Wal-Mart Stores, Inc., filed a timely appeal from an unemployment insurance decision dated September 21, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Johnathon E. Peaslee. After due notice was issued, a telephone hearing was held on October 25, 2004, with the claimant participating. Joe Huber, Store Manager in Spencer, Iowa, and Lynsey Selzer, Assistant Manager, participated in the hearing for the employer. Brian Swanson, Personnel Manager, was available to testify for the employer, but not called because his testimony would have been repetitive and unnecessary. Employer's Exhibits One and Two were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One and Two, the administrative law judge finds: The claimant was employed by the employer as a full-time overnight grocery stocker from August 21, 2003 until he was discharged on September 3, 2004. The claimant was discharged for an incident between he and the assistant manager, Lynsey Selzer, in the late evening hours of September 2, 2004 into the early morning hours of September 3, 2004. Ms. Selzer was walking out to talk to some associates when she observed the claimant unloading a pallet. The claimant asked her to stop and she did so. The claimant asked Ms. Selzer if she knew where certain water bottles were to go and she said no. The claimant then remarked, "what kind of fucking manager" are you. She asked him what he had said and he asked if she knew where the water was, but she didn't hear his response. She then asked the claimant if he had sworn at her and the claimant indicated that he had. Ms Selzer told the claimant that he was not suppose to swear on the floor. The claimant responded that it was his "God damn given right to swear." Ms. Selzer then said it was not, and if he wanted to talk to her about it they could go into the back room. The claimant did not and nothing more was said. The claimant was then discharged. The employer has a rule or policy in its handbook at page 22, section 9 prohibiting profanity and indicating that it is not to be tolerated. The claimant received a copy of this handbook as shown at Employer's Exhibit One and was aware of its contents and was aware further that profanity was not tolerated and was prohibited. There were no other reasons for the claimant's discharge.

Pursuant to his claim for unemployment insurance benefits filed effective August 29, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,040.00 as follows: zero benefits for benefit week ending September 4, 2004 (earnings (\$331.00); \$208.00 per week for four weeks from benefit week ending September 11, 2004 to benefit week ending October 2, 2004; zero benefits for benefit week ending October 9, 2004 (vacation pay \$320.00) and \$208.00 for benefit week ending October 16, 2004.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

The parties testified, and the administrative law judge concludes, that the claimant was discharged on September 3, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. There is very little disagreement between the witnesses as to the facts. In the late evening hours of September 2, 2004 into the early morning hours of September 3, 2004, the claimant asked the assistant manager, Lynsey Selzer, one of the employer's witnesses, "What kind of fucking manager" are you? He did this after Ms. Selzer had told him that she did not know where the water bottles he was unloading were to go. Ms. Selzer then asked the claimant something that she did not hear and then asked the claimant if he had sworn at her. The claimant admitted that he had and Ms. Selzer said that he was not suppose to swear on the floor. The claimant then responded after already

being admonished about his language that it was, "His God damn given right to swear." Ms. Selzer pointed out that it was not and asked if he wanted to talk about it to go to the back room. He did not and nothing more was said until the claimant was discharged later on September 3, 2004. The employer has a rule or policy in its handbook, a copy of which the claimant received as shown at Employer's Exhibit One, and of which he was aware, prohibiting profanity and indicating the employer does not tolerate it.

Because of the employer's policy of which the claimant concedes he was aware and because Ms. Selzer told the claimant after the first profanity that he was not suppose to use it and the claimant persisted, the administrative law judge concludes that the claimant's use of such profanity here constitutes a material breach of his duties and obligations arising out of his workers contract of employment and evinces a willful or wanton disregard of the employer's interest and is disqualifying misconduct. In Myers v. Employment Appeal Board, 462 N.W.2d 734, 738 (Iowa App. 1990), the Iowa Court of Appeals held that the 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. Here, although the claimant's use may have been isolated, the target of the abusive name calling was present and the target was further the assistant manager. The claimant persisted in using profanity even after he was told that he was not suppose to do so. The claimant seeks to justify his language by stating that he was joking. The administrative law judge does not find this credible and does not believe that such language is joking especially after being admonished the first time and then continuing to use profanity. Accordingly, the administrative law judge concludes that the claimant's behavior was disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,040.00 since separating from the employer herein on or about September 3, 2004 and filing for such benefits effective August 29, 2004, to which he is not entitled and for which he is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions Iowa law.

DECISION:

The representative's decision dated September 21, 2004, reference 01, is reversed. The claimant, Johnathon E. Peaslee, is not entitled to receive unemployment insurance benefits until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. The claimant is overpaid unemployment insurance benefits in the amount of \$1,040.00.

kjf/tjc