

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KELLY R SNODGRASS

Claimant

APPEAL NO: 11A-UI-01602-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 12/19/10

Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Kelly R. Snodgrass (claimant) appealed a representative's February 7, 2011 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Wal-Mart Stores, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 9, 2011. The claimant participated in the hearing and was represented by Paul Deck, Sr., attorney at law. Marlene Sartin of TALX Employer Services appeared on the employer's behalf and presented testimony from one witness, Greg Salmon. 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:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on May 1, 2009. He worked full time as a sales associate in employer's Sioux City, Iowa store. His last day of work was December 17, 2010. The employer discharged him on that date. The reason asserted for the discharge was the conclusion that he had violated a final warning from a decision making day in which he had been disciplined for approaching female employees and making them uncomfortable by seeking personal information.

The claimant had been given the decision making day and final warning on May 10, 2010. On about December 10, 2010, another female employee complained to Mr. Salmon, the shift manager, that the claimant had approached her in her department and asked her why she had not called him, and told her not to say anything to anyone. The claimant denied he had approached the employee about calling him. On or about December 7 the female employee had approached the claimant in his department and asked for his phone number in case she might want to call him about getting a ride to or from work, and the claimant did give his number to her. On or about December 10 the claimant acknowledged that as he was going to his meal break he passed the female employee who was in an aisle near her department on his route,

and that as he passed, he did ask that she not share his phone number with anyone else, as he was a private person. He denied saying or doing anything else that could be perceived as inappropriate or that might reasonably have made her feel uncomfortable.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is the belief that he had violated his final warning by approaching another female employee and made her feel uncomfortable by seeking personal information. The employer relies exclusively on the second-hand account from the female employee; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether the employee is credible, or whether the employer's witness might have misinterpreted or misunderstood aspects of the employee's report. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant did anything that could reasonably be found to be a violation of the final warning. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's February 7, 2011 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs