

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

THOMAS S KAIM

Claimant

APPEAL NO: 09A-UI-10872-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 06/21/09

Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct
Section 96.3-7 – Recovery of Overpayment

STATEMENT OF THE CASE:

The employer appealed a department decision dated July 15, 2009, reference 01, that held the claimant was not discharged for misconduct on June 20, 2009, and benefits are allowed. A telephone hearing was held on August 13, 2009. The claimant participated. Brian Hasselhoff, Assistant Manager, participated for the employer. Employer Exhibits One and Two was received as evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with employment.

Whether the claimant is overpaid benefits.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began full-time employment as an overnight produce stocker on August 12, 2008, and last worked for the employer on June 19, 2009. The claimant received a written warning for using profanity on March 3, 2009. He was observed by associates using profanity and very upset towards management. Claimant was advised his conduct using profanity was a violation of policy, and that a further incident could lead to termination.

When the claimant reported to work at 10 p.m. on June 19, he became upset about the failure of other associates to properly handle some cold pallets and put them in the cooler. The claimant went to the office to confront assistant manager Hasselhoff about his concerns. The claimant yelled at him and used profanity more than once. Hasselhoff requested they move the discussion to another office, because another manager and associate could hear the argument, but the claimant refused. When the claimant refused to calm down and continued his argumentative behavior, he was terminated.

After the termination, the claimant threw his discount card and ID badge and punched a door on the way out. The claimant was escorted from the premises, and local law enforcement was notified.

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 administrative law judge concludes the employer has established that the claimant was discharged for misconduct in connection with employment on June 19, 2009 due to a violation of the employer profanity policy in light of prior discipline.

The employer issued a written warning to the claimant about violating the profanity policy and accosting management on March 20, and put the claimant on notice that a further incident could mean termination. The second offense was a more direct verbal assault on a manager by the yelling and using profanity than the first. While the post termination behavior may not be considered as misconduct, it is demonstrative of how upset the claimant was in challenging his manager. An office setting is supposed to be a decorous place for civil conversations, and the claimant committed a serious breach of civil conduct by verbally accosting his manager in the presence of other employees.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Since the claimant is denied benefits by reason of this decision, there is an issue of overpayment that is remanded for determination.

DECISION:

The department decision dated July 15, 2009, reference 01, is reversed. The claimant was discharged for misconduct on June 19, 2009. Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times his weekly benefit amount, provided the claimant is otherwise eligible. The overpayment issue is remanded for determination.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs