

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MICHELE D SCARSBROOK**  
Claimant

**APPEAL NO. 09A-UI-18602-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**  
Employer

**Original Claim: 11/01/09  
Claimant: Respondent (1)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the December 1, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on January 25, 2010. Claimant Michele Scarsbrook participated. Derek Horton, Assistant Store Manager, represented the employer. Exhibits One, Three and Four were received into evidence.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Michele Scarsbrook was employed by the Marshalltown Wal-Mart on a full-time basis from 2003 until November 6, 2009, when Derek Horton, Assistant Store Manager, discharged her from the employment. During the last several months of the employment, Ms. Scarsbrook worked as an overnight stocker.

The final incident that triggered the discharge occurred on the shift that started on November 5 and ended on the morning of November 6. At the beginning of the shift, Ms. Scarsbrook and other members of the stocking crew began to move double pallets of merchandise from the back room to the sales floor. Ms. Scarsbrook and the other members of the stocking crew were hindered in moving the pallets from the backroom by a pallet that Doug Pothast, an inventory control associate, had placed in the way. Ms. Scarsbrook asked Mr. Pothast to move his pallet. Mr. Pothast responded that he would move the pallet when he got “damn good and ready.” Mr. Pothast added that “if someone had done their fucking job” earlier, he would not be counting the merchandise on the pallet. Ms. Scarsbrook waited a few minutes before she attempted to summon Derek Horton, Assistant Store Manager, by telephone to assist with the impasse.

As Ms. Scarsbrook was attempting to contact Mr. Horton, Mr. Horton had been passing nearby, heard the commotion in the backroom, and entered the backroom to investigate. Ms. Scarsbrook explained what had occurred. Ms. Scarsbrook included in her statement a reference to Mr. Pothast’s comment that “if someone had done their fucking job.” As soon as Mr. Horton heard the comment, he stopped the conversation and directed Ms. Scarsbrook to go perform work on the

sales floor. Mr. Horton did not hear Mr. Pothast's earlier comments to Ms. Scarsbrook and assumed that Ms. Scarsbrook had merely erupted in profanity directed at Mr. Pothast. Mr. Horton interviewed Mr. Pothast and other employees and obtained written statements. Mr. Horton did not interview Ms. Scarsbrook. At the end of the shift, Mr. Horton told Ms. Scarsbrook that she was being discharged for rude and abusive conduct directed at an associate in violation of the employer's policy. This was the sole basis for the discharge.

#### **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 employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. Warrell v. Iowa Dept. of Job Service, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority. Deever v. Hawkeye Window Cleaning, Inc. 447 N.W.2d 418 (Iowa Ct. App. 1989). The question of whether the use of improper language in the workplace is misconduct is nearly always a fact question. It must be considered with other relevant factors, including the context in which it is said, and the general work environment. See Myers v Employment Appeal Board, 462 N.W.2d 734, 738 (Iowa Ct. App. 1990).

The employer did not present testimony from anyone who had been present for the events that preceded Mr. Horton's involvement on November 5-6. The employer was unable to locate the written statements the employer collected from employees who had been present for the events that preceded Mr. Horton's involvement. The weight of the evidence indicates that the employer's witness, Mr. Horton, did not have the benefit of hearing Mr. Pothast's prior remarks, did not realize that Ms. Scarsbrook was attempting to report those remarks to him, and misconstrued Ms. Scarsbrook's profane utterance. The weight of the evidence indicates that Ms. Scarsbrook was merely attempting to report the incident to Mr. Horton at the time she uttered the profane remark.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Scarsbrook was discharged for no disqualifying reason. Accordingly, Ms. Scarsbrook is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Scarsbrook.

**DECISION:**

The Agency representative's December 1, 2009, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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