

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOHN R ABELE
Claimant

APPEAL NO. 12A-UI-04580-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 03/04/12
Claimant: Appellant (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated April 11, 2012, reference 02, which held that the claimant was not eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on May 16, 2012. The claimant participated. The employer participated by Brian Swanson, personnel coordinator. The record consists of the testimony of Brian Swanson; the testimony of John Abele; and Employer's Exhibits 1 through 8.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The claimant worked as a full-time overnight stocker for the Wal-Mart store located in Spencer, Iowa. The claimant was hired on May 24, 2006. His last day of work was March 8, 2012. He was terminated on March 8, 2012, for what the employer believed was insubordination.

On March 8, 2012, the claimant was responsible for unloading seven pallets of freight in four different departments. For the first hour of his shift, he was also required to help restock the grocery aisles so that the floor cleaners could wash and wax the aisles. He got started on his freight an hour late as a result of helping out in the grocery department. The claimant had discarded cardboard from unloading his pallets and he had been using the Tire Lube Express area to concentrate his cardboard so that he could dispose of it when he had a chance. There were big tubs that were used to dispose of cardboard.

The claimant's assistant manager, Erin, asked the claimant to get rid of his cardboard, which he did. He missed one tub. Erin perceived that the claimant yelled at her and that he made a sarcastic remark about how long she had been on night shift. The claimant sometimes speaks

loudly because he has a hearing loss in his right ear. He did not make a sarcastic comment to Erin. Erin made the decision to terminate the claimant. Erin did not testify at the hearing.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Insubordination, which is the continued failure to follow reasonable instructions, constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990) The employer has the burden of proof to show misconduct.

There is insufficient evidence in this record to show misconduct. The individual with personal knowledge of what occurred on March 8, 2012, was Erin, the assistant manager. She did not

testify at the hearing. The employer's witness was only able to repeat what was shown in the file and what he had been told by Erin. This is hearsay evidence. Hearsay evidence is admissible in administrative hearings, but it has limited probative value when it is the only evidence that the employer provides to show misconduct.

Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs. Iowa Code Sec. 17A.14(1). Allegations of misconduct 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).

The Iowa Court of Appeals set forth a methodology for making the determination as to whether hearsay rises to the level of substantial evidence. In Schmitz v. Iowa Department of Human Services, 461 N.W.2d 603, 607-608 (Iowa App. 1990), the Court required evaluation of the "quality and quantity of the [hearsay] evidence to see whether it rises to the necessary levels of trustworthiness, credibility and accuracy required by a reasonably prudent person in the conduct of their affairs." To perform this evaluation, the Court developed a five-point test, requiring agencies to employ a "common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better evidence; (4) the need for precision; (5) the administrative policy to be fulfilled." Id. At 608.

The claimant testified live under oath and was subject to cross examination. He adamantly denied having disobeyed Erin and speaking disrespectfully to her. Without Erin's testimony, the administrative law judge has no ability to judge her credibility and weigh her evidence against the claimant's testimony. The employer has the burden of proof to show misconduct. That burden has not been met. Benefits are denied.

DECISION:

The representative's decision dated April 11, 2012, reference 02, is affirmed. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw