

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

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WAL-MART STORES INC
C/O FRICK UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-03818-JTT
OC: 02/26/06 R: 04
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, 4th 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct
Section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

Wal-Mart filed a timely appeal from the March 23, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 25, 2005. Claimant Maria Sanchez did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Assistant Manager Gary Sheldon represented the employer and presented additional testimony through Personnel Manager Mindy Coats. Exhibits One, Three, and Five were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Maria Sanchez was employed by Wal-Mart as a full-time snack bar associate from October 3, 2005 until February 22, 2006, when Store Manager Dan Cosner discharged her.

The final incident that prompted the discharge occurred on February 21. Ms. Sanchez did not work at Wal-Mart on that day. A store greeter summoned management to the front of the store to address a verbal dispute taking place outside the entrance. Manager Dan Cosner, Assistant Manager Gary Sheldon and a management trainee exited the building and observed Ms. Sanchez in a verbal confrontation with a male. Ms. Sanchez and the male were several feet away from one another. Mr. Sheldon heard Ms. Sanchez refer to the male as a "mother fucker" and "nigger". Though the other party to the dispute was yelling at Ms. Sanchez, Mr. Sheldon could not make out what the other party was saying to Ms. Sanchez. Mr. Cosner heard the male participant tell Ms. Sanchez that she was a crazy person. Mr. Sheldon estimates that the exchange had been taking place for one or two minutes before he began to observe it. After the verbal exchange, Ms. Sanchez got into a vehicle and waited for the driver. The male counterpart to the dispute entered the Wal-Mart with his female companion. The female companion asked Store Manager Cosner whether he was going to let Wal-Mart associates talk to Wal-Mart customers like that. The female companion told Mr. Cosner that Ms. Sanchez was crazy and added that the male involved in the exchange with Ms. Sanchez was Puerto Rican, not African American.

Because Ms. Sanchez was not on-duty, the employer did not speak with her at the time of the incident. Store Manager Dan Cosner spoke with Ms. Sanchez the next day and discharged her at that time.

Wal-Mart's written progressive discipline policy includes profanity as an example of misconduct that might lead to discipline. The same policy lists "Rude/Abusive conduct toward a Customer/Member or another Associate" as "Gross Misconduct" that will subject an employee to immediate discharge. The employer made Ms. Sanchez aware of the policy during the orientation process at the beginning of her employment. The policy statement does not indicate that the policy is limited to on-duty conduct.

Ms. Sanchez established a claim for benefits that was effective February 26, 2006 and has received benefits totaling \$84.00.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Sanchez was discharged for misconduct in connection with the employment. It does.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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).

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).

Violation of a specific work rule, even off-duty, can constitute misconduct. In Kleidosty v. EAB, 482 N.W.2d 416, 418 (Iowa 1992).

The evidence in the record establishes that Wal-Mart had a specific work rule that prohibited rude and abusive conduct toward a customer and warned Ms. Sanchez that such behavior would subject her to immediate discharge. Ms. Sanchez's utterances were rude and abusive in the extreme, involving use of vulgar language and an inflammatory racial slur. Ms. Sanchez's utterances were directed at a Wal-Mart customer on Wal-Mart property and presumably in the

presence of other Wal-Mart customers. Ms. Sanchez's conduct was in willful and wanton disregard of the interests of her employer and violated the standards of conduct that the employer reasonably expected of its employees.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Sanchez was discharged for misconduct in connection with the employment. Accordingly, Ms. Sanchez is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Sanchez.

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 \$84.00 in benefits Ms. Sanchez has received constitutes an overpayment that Ms. Sanchez must repay to Iowa Workforce Development.

DECISION:

The Agency representative's decision dated March 23, 2006, reference 01, is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account shall not be charged. The claimant is overpaid \$84.00.

jt/kkf