

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

JERRI LAVENDER
710 ½ E STATE ST
MARSHALLTOWN IA 50158

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

Appeal Number: 06A-UI-00444-JTT
OC: 12/11/05 R: 02
Claimant: Appellant (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

STATEMENT OF THE CASE:

Claimant Jerri Lavender filed a timely appeal from the January 3, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on January 30, 2006. Ms. Lavender participated in the hearing. Store Manager Jack Hunter represented the employer. Exhibits One through Eight were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On April 26, 2004, Jerri Lavender commenced her employment with Wal-Mart as a full-time grocery employee. On October 22, 2006, Ms. Lavender was arrested in Marshall County and charged with the offenses of Operating While Intoxicated in violation of Iowa Code section 321J.2, Possession of a Controlled Substance in violation of Iowa Code section 124.401, Possession of

Drug Paraphernalia in violation of Iowa Code section 124.414 and Failure to Provide Proof of Insurance in violation of Iowa Code section 321.20B. All charges were still pending at the time of the unemployment insurance appeal hearing. Wal-Mart Management learned of the arrest and charges on November 4.

Wal-Mart has a written policy that subjects employees arrested for conduct outside work to a period of unpaid suspension while the charges are pending and subjects that employee to discharge upon a conviction or receipt of a deferred judgment. Wal-Mart also has a written "Alcohol and Drug Abuse" policy that prohibits "the use, possession, sale, transfer, acceptance, solicitation or purchase of illegal drugs at any time." [Emphasis added.] Ms. Lavender was made aware of both policies at the time of hire and signed her acknowledgment of the Alcohol and Drug Abuse policy on April 26, 2004. Pursuant to the above policies, Co-Manager Saturnino Reyes met with Ms. Lavender on November 4, 2005, and advised Ms. Lavender that she would be suspended until resolution of her criminal charges. Ms. Lavender continued on the disciplinary suspension at the time of the hearing.

REASONING AND CONCLUSIONS OF LAW:

871 IAC 24.32(9) provides:

(9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

The question is whether the evidence in the record establishes that Ms. Lavender was suspended for misconduct in connection with the employment. It does not.

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). The termination of employment must be based on a current act. See 871 IAC 24.32(8).

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).

Violation of a specific work rule, even off-duty, can constitute misconduct. See Kleidosty v. EAB, 482 N.W.2d 416, 418 (Iowa 1992). In Kleidosty, the employer had a specific rule prohibiting immoral and illegal conduct. In Kleidosty, the worker was convicted of selling cocaine off the employer's premises. In Kleidosty, the Supreme Court of Iowa found misconduct.

The evidence in the record establishes that Wal-Mart has an Alcohol & Drug Abuse policy that applies to off-duty conduct. The difference between the Kleidosty case and the present case is that Ms. Lavender has not yet been convicted of a crime. Accordingly, the evidence in the record at present is insufficient to prove misconduct. Accordingly, the administrative law judge concludes that Ms. Lavender was suspended for no disqualifying reason. Accordingly, Ms. Lavender is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Lavender.

Workforce Development rule 24.32(3) addresses "gross misconduct" and provides as follows:

24.32(3) Gross misconduct.

- a. For the purposes of these rules gross misconduct shall be defined as misconduct involving an indictable offense in connection with the claimant's employment, provided that such claimant is duly convicted thereof or has signed a statement admitting that such claimant has committed such act.
- b. An indictable offense means a common law or statutory offense presented on indictment or on county attorney's information, and includes all felonies and all indictable misdemeanors punishable by a fine of more than \$500 or by imprisonment in the county jail for more than 30 days.

In the event that Ms. Lavender is convicted of an indictable offense, the employer may contact Iowa Workforce Development for a determination of whether Ms. Lavender should be disqualified for benefits, and/or the employer relieved of charges, based on gross misconduct.

DECISION:

The Agency representative's decision dated January 3, 2006, reference 01, is reversed. 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.

jt/kjf