

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DARYL L STANLEY
Claimant

APPEAL NO. 14A-UI-00610-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 12/15/13
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 January 7, 2014, reference 01, decision that allowed benefits to the claimant provided the claimant was otherwise eligible and that held the employer's account could be charged for benefits. After due notice was issued, a hearing was held on February 10, 2014. Claimant Daryl Stanley participated. Karla Raney represented the employer and presented additional testimony through Natasha Smith. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One, Two and Three 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: Daryl Stanley was employed by Wal-Mart as a part-time meat department sales associate from July 2012 until December 13, 2013, when Karla Raney, Store Manager, discharged him from the employment for violation of the employer's policy concerning horseplay. Mr. Stanley was aware of the policy. The incident that triggered the discharge occurred in a backroom area on November 24, 2013. On that day, a female coworker, Lisa, light-heartedly tapped Mr. Stanley on the nose with a piece of cardboard. Mr. Stanley immediately responded with a quick swat on Lisa's rear. Mr. Stanley intended nothing violent, offensive or sexual at the time Lisa did not perceive the act as violent, offensive or sexual in nature. Mr. Stanley was not angry. Lisa light-heartedly responded, "Hey!" She and Mr. Stanley then went about their business. Another employee, Vincent, reported the incident to a supervisor. Natasha Smith, Assistant Manager, interviewed Mr. Stanley and the other employee and suspended Mr. Stanley on November 24, 2013 pending a decision about whether he would be allowed to continue in the employment. The employer subsequently discharged Mr. Stanley on November 13, 2013.

In making the decision to end the employment, the employer considered an incident in May 2013 wherein Mr. Stanley dropped a box on the floor and used profanity when speaking to

himself in a cooler. At the time, Mr. Stanley was upset about how items had been arranged in the cooler. Mr. Stanley was unaware at the time he used the profanity that others outside the cooler could hear him.

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).

The weight of the evidence in the record does not establish misconduct in connection with the final incident that triggered the discharge. The weight of the evidence indicates that the female coworker's action with the cardboard and Mr. Stanley's act of swatting the coworker one time on the rear did constitute mild horseplay. The weight of the evidence fails to establish that Mr. Stanley was angry at the time. The evidence establishes that Mr. Stanley did not initiate the horseplay, but made a momentary error in judgment when he swatted the coworker as part of a light-hearted interaction. The weight of the evidence fails to establish any intent on the part of Mr. Stanley to offend or harass the female coworker. The weight of the evidence fails to establish that the female coworker felt offended or harassed by the incident. There was no sexual component to the incident. The totality of the evidence indicates that the incident was an isolated error in judgment on the part of Mr. Stanley, rather than a willful disregard of the employer's policies or interests.

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).

Mr. Stanley's isolated use of profanity in May 2013 did not constitute misconduct in connection with the employment. It, too, involved an isolated error in judgment wherein Mr. Stanley was only talking to himself and expressing frustration.

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

DECISION:

The Agency representative's January 7, 2014, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css