

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

JANETTE E BURKE-OPHEIM
74A WESTVIEW
MILFORD IA 51351

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

Appeal Number: 04A-UI-10467-S2T
OC: 08/29/04 R: 01
Claimant: Respondent (1)

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:

Wal-Mart Stores (employer) appealed a representative's September 16, 2004 decision (reference 01) that concluded Janette Burke-Opheim (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 19, 2004. The claimant participated personally. The employer participated by Joseph Huber, Store Manager. Brian Swanson observed the hearing. The employer offered one exhibit which was marked for identification as Exhibit One. Exhibit One was received into evidence.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on April 30, 2003, as a full-time overnight sales clerk. The claimant received a copy of the employer's handbook and signed for its receipt on April 30, 2003. The employer has an open-door policy in the handbook which calls for the termination of an employee who retaliates against an employee who has complained to the employer. The claimant received warnings on April 20, May 20 and May 29, 2004, for attendance issues.

The claimant's employee card that obtained her discounts was not working properly. The employer ordered her a new one but in the meantime she had to go to a supervisor to purchase items and get her discount. The claimant and her supervisor had a personality conflict. In mid-August 2004, the claimant went to her supervisor to ring up a meal with an employee discount. The supervisor refused to give the claimant her discount. The claimant asked other managers if the supervisor could refuse to give an employee the discount. The manager's were not certain. The supervisor did not like the fact that the claimant complained about her to other managers.

On August 18, 2004, a manager told the claimant an employee had complained that the claimant was not staying on task and doing her work. The claimant said she had a migraine. The manager sent the claimant home. The claimant believed it was the supervisor who had complained about her. On August 19, 2004, the claimant told the supervisor "Not that it's any of your business but the last time we worked I had a migraine headache." The employer took this as a violation of the employer's open-door policy. On August 30, 2004, the employer terminated the claimant. The claimant believed that she was terminated for complaining about the supervisor in mid-August 2004.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes she was 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, (8) 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).

(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.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident provided by the employer occurred on August 18, 2004. The claimant was not discharged until August 30, 2004. In addition, the incident which occurred on August 19, 2004, does not rise to the level of misconduct. The claimant should be allowed to give information about her condition to her supervisor and to complain about that supervisor to a manager without fear of retaliation. The employer did not afford the claimant with the same protections as the supervisor. The employer has failed to provide any evidence of willful and deliberate misconduct which was the final incident leading to the discharge and disqualification may not be imposed.

DECISION:

The representative's September 16, 2004 decision (reference 01) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed provided the claimant is otherwise eligible.

bas/b