

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JASON FENDER
Claimant

APPEAL NO: 10A-UI-03833-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 02-07-10
Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 26, 2010, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on April 26, 2010. The claimant participated in the hearing. Jeremy Shively, Grocery Manager, participated in the hearing on behalf of the employer. Claimant's Exhibits A, B and C, were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time overnight merchandiser for Wal-Mart from August 20, 2008 to February 9, 2010. On January 28, 2010, there was a freezer/cooler employee meeting attended by Grocery Manager Jeremy Shively, Manager Eric Long and two associates including the claimant. The claimant became upset and said he felt the night crew was always being singled out and blamed for things the day crew failed to do and stated, "We always have to clean up after the fucking day crew." He caught himself using profanity and tried to apologize to Mr. Shively but Mr. Long continually interrupted and was very loud and after approximately five minutes the claimant raised his voice as well and was sent home. He was suspended two weeks without pay while the employer investigated, took statements from witnesses and spoke to the legal department and his employment was terminated February 9, 2010, for using profanity which results in automatic termination.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000). While it was inappropriate and unprofessional for the claimant to use profanity during the heated meeting January 28, 2010, he slipped, caught himself doing so and tried to apologize immediately. There were no customers present and profanity was not completely unknown in the overnight merchandiser area. Although the employer's witness testified the use of profanity results in immediate termination another employee used the f-word on a different occasion when speaking to Mr. Long and was not disciplined for doing so (Claimant's Exhibit B). Additionally, while the employer testified use of profanity is always grounds for immediate termination, it is

unclear why the employer needed 13 days to make the decision and notify the claimant his employment was terminated. This was an isolated incident and under the above stated circumstances the administrative law judge concludes the claimant's actions do not rise to the level of disqualifying job misconduct as defined by Iowa law. Therefore, benefits are allowed.

DECISION:

The February 26, 2010, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

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