

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**FRANK M BARNER**  
Claimant

**WAL-MART STORES INC**  
Employer

**APPEAL 17A-UI-07958-LJ-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 07/16/17**  
**Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the August 1, 2017 (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged for violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on August 23, 2017. The claimant, Frank M. Barner, participated. The employer, Wal-Mart Stores, Inc., participated through Jesse Spors, Co-Manager. Employer's Exhibits 1 through 9 were received and admitted into the record without objection.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time, most recently as a sporting goods sales associate, from April 12, 2016, until July 7, 2017, when he was discharged for violating the drug and alcohol policy. Claimant last reported to work for a shift beginning at 1:00 p.m. on July 1, 2017. That day, claimant approached Spors to say hello and Spors smelled alcohol on claimant's breath. Claimant was also sluggish and staggering, and his eyes were bloodshot and glazed over. Spors spoke with Co-Manager, Jon Wilson, who agreed with Spors' observations. (Exhibit 3) Employee Olivia Robbins also smelled alcohol on claimant's breath, and she observed claimant acting out of character, flirting with management and standing alone in the back corner of the backroom. (Exhibit 4)

Claimant was called into the office to speak with Spors and Wilson. He admitted to drinking alcohol before coming to work and reported that he last drank around 1:00 a.m. or 2:00 a.m. Claimant explained that he had driven to work after consuming alcohol and had slept in his car in the parking lot so he would not miss his shift. Spors began preparing the paperwork to have claimant go take an alcohol and drug test, per the employer's policy. (Exhibits 6 and 9) Claimant refused to submit to the alcohol and drug test. He objected to being sent to the hospital to take the test, because it would be busy. Additionally, he informed Spors and Wilson that he had used marijuana several days prior and did not want to take the drug test. At that

time, the employer's home office told Spors to suspend claimant with pay pending additional investigation. Everyone in management who interacted with claimant prepared written statements, and the matter was submitted to the home office for review. The home office determined claimant should be discharged for coming to work under the influence of alcohol and admitting to smoking marijuana while employed. The employer's Alcohol and Drug Free Workplace Policy prohibits using any drug that is illegal under federal or state law. (Exhibit 9) The policy also prohibits reporting to work under the influence of either drugs or alcohol. Claimant received a copy of this policy. (Exhibit 6) He acknowledged that refusing to comply with an alcohol and drug test would result in discharge from employment.

## **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for disqualifying, job-related misconduct. Benefits are withheld.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not

disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer provided credible testimony regarding claimant's final day at work and the end of his employment.

The employer is entitled to establish reasonable work rules and expect employees to abide by them. Here, the employer had an interest in its employees not consuming alcohol before work in a way that would affect their work. It provided both firsthand testimony and witness statements establishing that claimant came to work under the influence of alcohol. Additionally, claimant refused to take a drug and alcohol test when asked to do so, as he knew the test would come back positive for marijuana, at minimum. Claimant's actions were in deliberate disregard for the employer and amount to misconduct even without prior warning. The employer has established that claimant engaged in disqualifying, job related misconduct. Benefits are withheld.

#### **DECISION:**

The August 1, 2017 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Elizabeth A. Johnson  
Administrative Law Judge

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Decision Dated and Mailed

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