

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

REJOICE I SAID

Claimant

APPEAL NO: 07O-UI-05758-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

**OC: 04/01/07 R: 02
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc. (employer) appealed a representative's April 13, 2007 decision (reference 01) that concluded Rejoice I. Said (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 26, 2007. The claimant participated in the hearing. Kollin Kirby appeared on the employer's behalf. Magdy Salama served as interpreter. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on June 10, 2006. She worked full time as an overnight maintenance worker at the employer's West Des Moines, Iowa store. Her last day of work was February 19, 2007. The employer discharged her on February 20, 2007. The stated reason for the discharge was having an altercation with a coworker after prior unrelated warnings.

The claimant had received a warning on August 4, 2006 for attendance and a warning on January 23, 2007 for time clock errors. On the night of February 19 the claimant was taking a break in the employee lounge at approximately 2:00 a.m. She had put her feet up on a second chair when another employee who was pregnant came into the lounge and attempted to sit in the chair on which the claimant had her feet. The two skirmished for a short while with the coworker putting the claimant's feet off the chair and the claimant putting her feet back on the chair while telling the coworker to go sit in another chair. The coworker again began sitting in the chair while the claimant's feet were still there. The claimant then pushed the coworker with her feet so that the coworker fell to the floor. The coworker began suffering pains and was taken to the hospital in an ambulance.

The claimant then came to the employer's office and spoke to Mr. Kirby, the assistant manager. Mr. Kirby had already been told by two other coworkers that the claimant had pushed the pregnant coworker to the floor with her feet. When the claimant spoke to Mr. Kirby she admitted to him that the two had a dispute about the coworker wanting to sit in the chair in which the claimant had her feet and the claimant not wishing to move her feet, and she admitted to him that she was responsible for pushing the coworker so that she fell to the floor.

The claimant established a claim for unemployment insurance benefits effective April 1, 2007. The claimant has received unemployment insurance benefits after the separation from employment in the amount of \$1,465.00.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

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.

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 focus of the definition of misconduct is on acts or omissions by a claimant that “rise to the level of being deliberate, intentional or culpable.” Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

The administrative law judge finds the testimony of Mr. Kirby that the claimant admitted to having pushed the coworker with her feet so that she fell to the floor, which was corroborated by the information Mr. Kirby received from other coworkers, to be more credible than the claimant's current denial. Physical aggression at work can be misconduct. Savage v. Employment Appeal Board, 529 N.W.2d 640 (Iowa App. 1995). A discharge for having a physical altercation will be disqualifying misconduct unless if the claimant shows 1) failure from fault in bringing on the problem; 2) a necessity to fight back; and 3) she attempted to retreat if reasonably possible. Savage, supra. While the claimant may not have been solely at fault, she was at least partially at fault in bringing on the problem, she had no necessity to respond physically, and she did not attempt to retreat. The claimant's physical aggression toward the coworker shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

Iowa Code § 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's April 13, 2007 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of February 20, 2007. This disqualification continues until the claimant has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged. The claimant is overpaid benefits in the amount of \$1,465.00.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs