

**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**

**JUSTIN L WICKETT  
300 S “J” ST #6  
INDIANOLA IA 50125**

**WAL-MART STORES INC  
C/o TALX UC EXPRESS  
PO BOX 283  
ST LOUIS MO 63166-0283**

**Appeal Number: 05A-UI-00664-CT  
OC: 12/21/03 R: 02  
Claimant: Respondent (2)**

**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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5(2)a – Discharge for Misconduct  
Section 96.3(7) – Recovery of Overpayments

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc. filed an appeal from a representative's decision dated January 5, 2005, reference 05, which held that no disqualification would be imposed regarding Justin Wickett's separation from employment. After due notice was issued, a hearing was held by telephone at 10:00 a.m. on February 3, 2005. The employer participated by Joe Schmidt, Tire Lube Express Manager. Exhibits One through Five were admitted on the employer's behalf. Mr. Wickett responded to the notice of hearing but was not available at the number provided at the scheduled time of the hearing. He contacted the Appeals Section at 11:03 a.m. to advise that he missed the hearing because he was meeting with his attorney on an unrelated matter. He had not contacted the Appeals Section to advise that there would be a problem participating at the scheduled time.

Because he did not establish good cause for not being available or for not timely requesting a postponement, the administrative law judge declined to reopen the hearing record.

#### FINDINGS OF FACT:

Having heard the testimony of the witness and having reviewed all the evidence in the record, the administrative law judge finds: Mr. Wickett was employed by Wal-Mart from June 4 until September 7, 2004 as a full-time tire and lube technician. The final events, which caused his discharge, occurred on September 7. Oil and torque seal had been left on the seat of a customer's vehicle. Mr. Wickett denied responsibility for it but a review of the surveillance tape revealed that he was the person working on the vehicle. On that same day, he used profanity in the service area in the presence of at least two customers. He used the words "damn" and "fuck." The employer's policies prohibit the use of profanity. The employer also discovered on September 7 that Mr. Wickett had written graffiti in the bay. He had written "I hate this place" and "this place sucks."

The only disciplinary action received by Mr. Wickett was on August 5 when he placed the wrong oil filter in a vehicle. He did not check the filter book in the bay to verify that he had the correct filter. Mr. Wickett made a notation under the "associate's comments" section of the warning. He indicated that he would watch his mouth and try hard not to use foul language.

Mr. Wickett filed an additional claim for job insurance benefits effective December 5, 2004 and received \$112.00 for each of the two weeks ending December 18, 2004. He filed a new claim effective December 19, 2004 and has been paid \$560.00 on the new claim.

#### REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Mr. Wickett was separated from employment for any disqualifying reason. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Mr. Wickett's use of profanity on September 7 is sufficient to establish disqualifying misconduct. The profanity was used in anger and in the presence of at least two customers. The employer had the right to expect that customers would not be subjected to swearing from employees. Given his comments on the August 5 warning, Mr. Wickett knew that profanity was contrary to the employer's standards.

After considering all of the evidence, the administrative law judge concludes that disqualifying misconduct has been established. Accordingly, benefits are denied. Mr. Wickett has received \$784.00 in benefits since his disqualifying separation from Wal-Mart. Based on the decision herein, the benefits received now constitute an overpayment and must be repaid. Iowa Code section 96.3(7).

#### DECISION:

The representative's decision dated January 5, 2005, reference 05, is hereby reversed. Mr. Wickett was discharged for misconduct in connection with his employment. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he satisfies all other conditions of eligibility. Mr. Wickett has been overpaid \$784.00 in job insurance benefits.

cfc/sc