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

WILL A PLAYLE
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NEW SHARON IA 50207

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

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Appeal Number: 06A-UI-00846-RT
OC: 12-25-05 R: 03
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
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Wal-Mart Stores, Inc., filed a timely appeal from an unemployment insurance decision dated January 13, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Will A. Playle. After due notice was issued, a telephone hearing was held on February 8, 2006, with the claimant participating. The claimant was represented by Eric Palmer, Attorney at Law. John Capps, Assistant Manager of employer's store number 1393 in Oskaloosa, Iowa, where the claimant was employed, participated in the hearing for the employer. Employer's Exhibit One was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibit One, the administrative law judge finds: The claimant was employed by the employer as a full time overnight meat stocker from November 9, 2004 until he was discharged on December 23, 2005. The claimant was discharged for violation of the employer's harassment and integrity policies namely, its discrimination and harassment prevention policy as shown at Employer's Exhibit One. On December 20, 2005, the claimant got off work at 5:30 a.m. He went to his vehicle in the employer's parking lot parked in a public area of the parking lot and gathered 15 pictures which he placed in a brown paper bag and wrote on the brown paper bag "Merry Christmas John." The claimant then took the brown paper bag containing the pictures over to the vehicle of John Vannes, a co-worker and friend. The claimant opened the unlocked door of the vehicle belonging to Mr. Vannes and placed the pictures in the car of Mr. Vannes. He did so as a Christmas gift for Mr. Vannes. The pictures in the brown bag consisted of pictures of naked women but no men or animals and no specific sexual acts depicted. They were merely pictures of naked women. The claimant gave these pictures to Mr. Vannes as a Christmas gift because he and Mr. Vannes had been discussing going to a strip club for the claimant's birthday. The claimant thought that Mr. Vannes would want the pictures and that they would not offend him.

However, Mr. Vannes was offended by the pictures and reported this to the employer. Mr. Vannes did not know who had placed the pictures in his car and requested that the employer review the surveillance videotape of the section of the parking lot where he was parked. The employer did so and noted that the claimant was the one who placed the pictures in the car. The claimant admits he placed the pictures in the car of Mr. Vannes. The pictures had been in the claimant's car, and when the claimant took the pictures and placed them in the car of Mr. Vannes, he was not working for the employer or on the clock for the employer, and, further, both cars were parked in the public parking area of the employer's parking lot. The claimant gave the pictures to Mr. Vannes in this fashion because he seldom saw Mr. Vannes away from work. The claimant had never received any warnings or disciplines for this or similar behavior. There was no other reason for the claimant's discharge. The employer has a policy, as noted above and as shown at Employer's Exhibit One, that prohibits, among other things, the circulating of offensive pictures. There is no evidence that the claimant actually received a hard copy of the policy, but it is on the employer's computer. The claimant reviewed these policies on the computer, as shown at pages two and three of Employer's Exhibit One. The claimant did not know that the pictures he gave to Mr. Vannes and the manner in which he delivered them to Mr. Vannes violated the employer's policies. Pursuant to his claim for unemployment insurance benefits filed effective December 25, 2005, the claimant has received unemployment insurance benefits in the amount of $1,092.00 as follows: $156.00 per week for seven weeks from benefit week ending December 31, 2005 to benefit week ending February 11, 2006.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.

2. Whether the claimant is overpaid unemployment insurance benefits. He is 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 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).

The parties agree, and the administrative law judge concludes, that the claimant was discharged on December 23, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6 (2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Although it is a close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. There is very little dispute as to the facts and both witnesses were credible. The claimant took 15 pictures of naked women and put them in a brown paper bag, marked the brown paper bag "Merry Christmas John," and placed them in the vehicle of a co-worker, John Vannes, as a Christmas gift. Both vehicles were parked in a public area of the employer's parking lot. The claimant was not on the clock or working for the employer at the time. The claimant truly believed that Mr. Vannes would not be offended by the pictures. Mr. Vannes and the claimant had discussed going to a strip club to celebrate the claimant's birthday. The employer has a policy, as shown at Employer's Exhibit One, prohibiting, among

other things, the circulating of offensive pictures. There is not a preponderance of the evidence that the claimant actually received a hard copy of this policy but the policy was covered to some extent on the employer's computer, as shown in the last two pages of Employer's Exhibit One. However, the claimant credibly testified that he did not believe that the pictures and the manner in which he gave them to Mr. Vannes violated the employer's policies. The administrative law judge most certainly does not want to get into a lengthy and controversial discussion as to what pictures are pornographic or explicit or inappropriate and violate the employer's policies. However, the administrative law judge notes that the pictures that the claimant placed in the vehicle of Mr. Vannes were merely pictures of naked women and showed no men or animals nor any sex acts or other kinds of behavior. The administrative law judge does not condone the circulation of such pictures but must conclude on the evidence here that, because of the character of the pictures and the way in which the claimant gave the pictures to Mr. Vannes, the claimant's giving of the pictures to Mr. Vannes was not a deliberate act constituting a material breach of his duties and obligations arising out of his worker's contract of employment nor did it evince a willful or wanton disregard of the employer's interests as to establish disqualifying misconduct for those reasons. The more difficult issue is whether the claimant's acts were carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct.

The administrative law judge does conclude that the claimant's acts were negligent. He did not ascertain in advance whether the pictures would offend Mr. Vannes. The claimant had some good reasons to believe they would not, but nevertheless the claimant did not check with Mr. Vannes first. Mr. Vannes did not ask for the pictures nor was he aware that the pictures were going to be placed in his vehicle. The pictures were, after all, pictures of naked women. The claimant was at least generally aware of the employer's policies, and therefore the administrative law judge concludes that the claimant's giving of these pictures was carelessness or negligence. However, the administrative law judge is constrained to conclude that the claimant's act was not carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The evidence is clear that the claimant never received any warnings or disciplines for any similar behavior. Certainly, in retrospect, the claimant's actions were inappropriate and unwise. However, that is not the issue here. The issue is whether the claimant's acts rise to the level of disqualifying misconduct. The administrative law judge is constrained to conclude that here they do not. The claimant's acts were merely ordinary negligence in an isolated instance and not disqualifying misconduct.

In summary, and for all of the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided he is otherwise eligible.

Iowa Code section 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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $1,092.00 since separating from the employer herein on or about December 23, 2005, and filing for such benefits effective December 25, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of January 13, 2006, reference 01, is affirmed. The claimant, Will A. Playle, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

kkf/kjw