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

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Appeal Number: 05A-UI-11670-RT
OC: 10-16-05 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 November 2, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Terry D. Lehmkuhl. After due notice was issued, a telephone hearing was held on December 2, 2005, with the claimant participating. The claimant was represented by Michael Kennedy, Attorney at Law. Shana Richter, Assistant Manager for the Employer's store Number 2827 in Coralville, Iowa, where the claimant was employed, participated in the hearing for the employer. Ashlee Colebank, Sales Floor Associate, was available to testify for the employer but not called because her testimony would have been repetitive and unnecessary. Employer's Exhibits One and Two were 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 Exhibits One and Two, the administrative law judge finds: The claimant was employed by the employer, most recently for the last two months of his employment as a day maintenance associate, from March 1, 2004 until he was discharged on October 15, 2005. The claimant was discharged for an incident on October 8, 2005 involving another associate or co-worker. The associate walked through the door setting off an alarm. At first the claimant was polite and told the associate that she could not do this. She persisted in doing it and the claimant, after telling her three times she could not do it, lost his patience and loudly called her "stupid." The claimant used no profanity. The claimant had never committed such behavior before nor had he ever raised his voice to an associate or lost his patience before. This incident gave rise to what would have been the claimant's third coaching and under the employer's rules and policies as shown at Employer's Exhibit One, an associate is discharged after three such coachings. The claimant was then discharged on October 15, 2005. The employer also has policies that provide for respect to the individual as shown at Employer's Exhibit One. These policies are online using the employer's computer system and the claimant was aware of the policies.

On September 25, 2004, the claimant was given a written coaching for improvement as shown at Employer's Exhibit Two for working over six hours without taking a lunch break. The employer requires that an employee or associate take a lunch break before that employee has worked six hours. The claimant depended upon his manager or team leader to tell him when to take a break. On the occasion in question no one had told the claimant to take a break so he did not do so. On August 7, 2005, the claimant was given a second coaching for improvement form also as shown at Employer's Exhibit Two for failing to stop a customer who was walking out the door with three empty boxes and not looking inside the boxes to ensure that there was no merchandise inside. The claimant did not do so because another customer had gone through the door setting off the alarm and the claimant was talking to that customer at the time the other customer with the boxes went through the door. When the customer with the boxes went through the door that customer did not set off the alarm. At that time the claimant was working as a door greeter, the duties for which include checking parcels and boxes carried out by customers. On the day in question, the claimant was the only door greeter working and was busy and did not have time to check the boxes when he was dealing with a customer who had sounded the alarm. Pursuant to his claim for unemployment insurance benefits filed effective October 16, 2005, the claimant has received unemployment insurance benefits in the amount of $720.00 as follows: $120.00 per week for six weeks from benefit week ending October 22, 2005 to benefit week ending November 26, 2005.

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 October 15, 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 little disagreement between the parties as to the facts. The claimant was discharged when he yelled at a co-worker or associate and called that co-worker or associate "stupid." The claimant concedes that he did so but the co-worker or associate was walking through a door and setting off an alarm and that he had told the associate or cashier not to do so on three occasions. When the claimant first instructed the associate not to do so he was calm and not loud. But after the third time he lost his patience and became loud and called the associate "stupid." The claimant did not use any profanity. The claimant had never been accused of such behavior before nor had he ever done so before. He had never raised

his voice to an associate or customer or lost patience with an associate or customer before. On the record here, the administrative law judge is constrained to conclude that the claimant's act giving rise to his discharge was merely ordinary negligence in an isolated instance and does not rise to the level of a deliberate act or omission constituting a material breach of his duties nor does it evince a willful or wanton disregard of the employer's interest and is therefore not disqualifying misconduct.

The more difficult question is whether the claimant's act on October 8, 2005, was carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. Here, the administrative law judge concludes that the act does not establish such required recurring negligence. It is true that the claimant had had two prior written coachings for improvement as shown at Employer's Exhibit Two. However, both coachings were for totally unrelated behavior and one of them, on September 25, 2004, was given to the claimant over one year before the incident giving rise to his discharge. On that coaching he was only given the written coaching for improvement because he did not take a lunch break within the required six hours. The claimant credibly testified that he did not do so because usually he was told to take his breaks by a manager or team leader and no one had told him to take a break so he did not. The claimant offered a satisfactory explanation for his failure to take a lunch break and further the incident is so far removed in time and so unrelated to the conduct giving rise to his discharge that it is really not relevant in determining recurring negligence. The other written coaching for improvement was given to the claimant on August 7, 2005 for failing to check a customer who was carrying boxes through the door. The claimant credibly testified that at the time he was checking a customer who had gone through the door and set off the alarm. The customer with the boxes for whom the claimant was given the warning did not set off the alarm. The claimant credibly testified that at the time he was the only door greeter and was busy with the customer who set off the alarm. The administrative law judge concludes that the claimant's explanation and the dissimilarity between that incident and the one giving rise to his discharge also does not establish recurring negligence.

In summary, and for all 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 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 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 $720.00 since separating from the employer herein on or about October 15, 2005 and filing for such benefits effective October 16, 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 November 2, 2005, reference 01, is affirmed. The claimant, Terry D. Lehmkuhl, 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 her separation from the employer herein.

kkf/kjw