

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARJORIE J KEPHART
Claimant

APPEAL NO. 06A-UI-11169-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL MART STORES INC
Employer

**OC: 10-01-06 R: 02
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 8, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 6, 2006. The claimant did participate. The employer did participate through (representative) Jeremy Lyons, Store Manager, and Laura Kolars, Personnel Manager. Employer's Exhibit One was received.

ISSUE:

Was the claimant discharged for work related misconduct?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a cashier full time beginning September 10, 2001 through October 1, 2006 when she was discharged.

On September 15 the claimant waited on some African American customers. After completing the transaction, one of the customers sought out a manager and complained to him that the claimant had refused to put her change and her receipt in her hand and that when she asked for the receipt in her hand, the claimant put it in the bag. The manager took the customers complaint and also gave her the corporate hotline number to call to complain. When interviewed by management about the complaint on September 16, the claimant said, "those people were out to get her" and "those people did not understand our way of doing things." When she was asked by Mr. Lyons who she meant by "those people," the claimant indicated "black people."

The employer reviewed the customer's complaint and noted that the customer said she had asked for her change in her hand, which allegedly the claimant had refused to give her. The employer's review of the transaction revealed that it was a credit card transaction and that the customer did not have any change due her at the end of the transaction. There was no change for the claimant to put into the customers hand. The only witness to the event who testified at the hearing was the claimant.

The claimant did not use any profanity when speaking to the customer, nor was her “those people” comment overheard by any customer. At hearing the claimant indicated she meant intimidating people, not black people when she had answered Mr. Lyon’s question about who she believed “those people” to be. The claimant alleges she put the receipt in the customer’s hand, as she admitted she had been trained to do, when the customer asked her for it.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be “substantial.” When based on carelessness, the carelessness must actually indicate a “wrongful intent” to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351

N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

The claimant may well hold some biased, ignorant ideas, stereotypes and perceptions. However, it is not misconduct or disqualifying conduct to be biased if that conduct is not displayed in the workplace. What must be evaluated are the claimant's actions during a transaction with the customer. The only person to witness the transaction who testified at the hearing was the claimant. The claimant indicated she put the receipt in the customer's hand when the customer asked her to do so. The customer's complaint to the manager was that the claimant did not put her receipt or her change in her hand. Yet, the employer's own records reveal that the customer had no change due to her because it was a credit card transaction. The customer's allegation of facts outlined in her complaint does not match up with the employer's known facts about the transaction.

The claimant indicated she meant something different than "black people" when she was being interviewed by Mr. Lyons. The administrative law judge is persuaded that the claimant answered Mr. Lyons question with exactly what she thought when she was first questioned and that she is now at hearing attempting to explain away her own prejudiced and bias feelings by indicating she really meant something else. However, the employer has not established that the claimant treated the customer in any biased or prejudicial way. The customer's complaint does not make sense in light of the fact that no change was involved in the transaction. While the claimant may hold some opinions that are biased and incorrect, the employer has not established that she treated the customer in an inappropriate manner. The claimant was discharged not for how she treated the customer but because she expressed what can be considered a racist, stereotyped view of African Americans. Her conduct was an isolated incident of poor judgment; and inasmuch as employer had not previously warned claimant about any of the issues leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. While the employer may have had good cause to discharge, conduct which might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The November 8, 2006, reference 01, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/kjw