

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DUT MAWIEN
Claimant

APPEAL NO: 14A-UI-09407-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 08/25/13
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the September 2, 2014, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on October 1, 2014. The claimant participated in the hearing with Paralegal Jim Hamilton and Interpreter Dhoal Larjin. Chris Canon, Shift Manager; Heather Snyder, Personnel Coordinator; and Susan Zevin, Employer Representative; participated in the hearing on behalf of the employer. Claimant's Exhibit A was admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time overnight maintenance worker for Wal-Mart from May 26, 2012 to August 4, 2014. He was discharged after the employer determined he violated its Violence-Free Workplace Policy (Claimant's Exhibit A).

On July 24, 2014, a female employee, Aldigana (Ally), and male employee, Hassan, were following the claimant through the store and Ally repeatedly told the claimant he smelled like a hot dog. The claimant felt bullied and was upset by her comments. He stopped and turned around to face Ally and Hassan but Ally ignored the claimant's questions about why she kept saying he smelled like a hot dog. The claimant grew frustrated and upset and when Ally and Hassan started to walk away from him without having answered his question, the claimant tapped Ally on the shoulder with two fingers in an attempt to get her to stay and talk to him. They were in the electronics area of the store and Ally reported the incident to management. When Assistant Manager Collin Kirby arrived in electronics the claimant was yelling at Ally and Hassan saying, "You can't call me that." Mr. Kirby asked Ally what was going on and she kept

saying the claimant could not touch her and the claimant kept saying, "You can't call me that." Mr. Kirby asked the claimant to tell him what they were saying but the claimant continued to repeat they could not call him that. Finally, Mr. Kirby asked the claimant to accompany him to the office.

Once they reached the office, the claimant told Mr. Kirby they (Ally and Hassan) were talking about him and said he smelled like a hot dog and "they can't do that." Mr. Kirby instructed the claimant to wait in the office while he went to talk to Ally and Hassan. Ally told Mr. Kirby the claimant started yelling at her and Hassan and then poked her twice in the shoulder. Mr. Kirby returned to the office and asked the claimant if he touched Ally and he said yes but that he just "brushed her on the shoulders." Mr. Kirby sent the claimant home pending the outcome of an investigation to be conducted by Shift Manager Emily Pettit. During the investigation the employer took written statements from Ally and Hassan but refused to make either of those employees or their written statements available for the hearing. Following the investigation, the employer terminated the claimant's employment August 4, 2014.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

While the claimant obviously should not have touched Ally in any manner, tapping her on her shoulder to get her attention to ask why she was taunting him does not meet the employer's definition of workplace violence because it was not conduct or communication which harms, damages, injures, harasses, intimidates, bullies, threatens, stalks, taunts, forces, coerces, restrains, or confines another person and did not reasonably cause another person to fear for his/her health or safety or intentionally harm or damages property (Claimant's Exhibit A). If anything, Ally and Hassan were taunting, harassing and bullying the claimant by repeating that he smelled like a hot dog which was designed to upset him and had the desired outcome.

Because Ally and Hassan did not testify and the employer would not produce their written statements either, the administrative law judge may conclude that their testimony would have harmed the employer's case. If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). In the present case, the employer did not provide any good cause reasons beside a vague confidentiality claim for failing to present Ally and Hassan to provide testimony and face cross-examination or to grant access to their written statements. That leads to the conclusion that their versions of the events of July 24, 2014, might not stand up to such questioning and scrutiny.

It would appear that the claimant's accuser's behavior more closely mirrors the employer's violence-free workplace policy definition than does that of the claimant. Ally was name calling, taunting and harassing the claimant and while he should have ignored her immature behavior or simply reported it to a supervisor, his actions in touching or tapping her on the shoulder does not rise to the level of workplace violence or disqualifying job misconduct as that term is defined by Iowa law. Therefore, benefits are allowed.

DECISION:

The September 2, 2014, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs