

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BENJAMIN B HESTER**  
Claimant

**APPEAL NO. 08A-UI-00786-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**  
Employer

**OC: 01/08/08 R: 04  
Claimant: Respondent (1)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Wal-Mart Stores, Inc., filed a timely appeal from the January 23, 2008, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on February 19, 2008. Claimant Benjamin Hester participated. Dennis Percell, Washington, Iowa Store Manager, represented the employer and presented additional testimony through Curtis Lee Weeks, Muscatine, Iowa Assistant Manager. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One, Two and Three into evidence.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Benjamin Hester was employed by Wal-Mart as a full-time Connect Center Associate at the Clinton store from November 25, 2006 until July 21, 2007, when employer's home office in Arkansas made the decision to discharge Mr. Hester. Dennis Percell was a co-manager and Curtis Lee Weeks was an assistant manager at the Clinton store throughout Mr. Hester's employment. These managers regarded Mr. Hester as an excellent employee.

The final incident that prompted the discharge occurred during the third week of June 2007. Mr. Hester overheard an employee in the electronics department interacting with a difficult customer who was trying to locate a particular notebook computer. The previous day, Mr. Hester had fielded a call from a customer looking for a computer and thought the customer in the electronics department might be the same customer he spoke to the previous day. At the time of the prior phone call, Mr. Hester had confirmed that the computer the customer was seeking was in stock. Mr. Hester approached the customer and attempted to assist the customer. Mr. Hester escorted the customer to the display case where the notebook computers were located. The computer Mr. Hester had confirmed was in stock the previous day had since sold out. During Mr. Hester's interaction with the customer, the customer consistently voiced his

disapproval with Wal-Mart, with Wal-Mart employees, and with Wal-Mart customer service. The customer used profanity to express his feelings and characterized Wal-Mart employees and/or customer service as "shit or "bullshit." Mr. Hester continued to attempt to serve the customer and to calm the customer. The customer persisted in his critical and profane remarks. Mr. Hester lost his patience and told the customer, "Sir, you are an asshole." The customer asked Mr. Hester whether he had in fact said what customer thought he said and Mr. Hester confirmed his previous statement. The customer became even more upset.

Mr. Hester concluded, belatedly, that he needed to summon a manager. Mr. Hester walked to the front of the store and requested a manager be sent to the electronics department. Assistant Manager Curtis Lee Weeks responded. Mr. Weeks separated the parties. Mr. Weeks interviewed the customer and then interviewed Mr. Hester. Mr. Hester confirmed he had made the remark. Mr. Weeks concluded that the customer's words and conduct had provided Mr. Hester's outburst. Mr. Weeks attempted to smooth things over with the customer by discounting an upgrade computer. Before the customer left the store, Mr. Hester apologized to the customer and the customer accepted his apology. Mr. Weeks advised Mr. Hester that he believed he had sufficiently smoothed things over with the customer, but that further consequences, including possible discharge, might result after the employer's home office reviewed the matter. Mr. Hester had received no prior reprimands for similar conduct.

The employer forwarded information regarding the incident to the employer's home office in Arkansas. Soon after the incident, Mr. Hester commenced a vacation. Mr. Hester left for vacation on June 30 and returned on July 12. Mr. Hester returned to work and continued to work until July 21, 2007, when he was summoned to a meeting with Co-Manager Dennis Purcell and Assistant Manager Curtis Lee Weeks. Though the managers had forwarded information to the home office, the managers had not recommended a discharge. The home office decided to discharge Mr. Hester for violating the employer's policy regarding use of profanity. The employer's written work rules included use of profanity as a form of misconduct that could result in disciplinary action under the employer's progressive discipline policy. The employer's work rules did not include profanity in the group of "gross misconduct" violations that would subject an employee to immediate termination. The home office bypassed its own progressive discipline policy in making the decision to discharge Mr. Hester. The employer felt compelled, in light of its handling of prior incidents involving the use of profanity, to discharge Mr. Hester from the employment.

#### **REASONING AND CONCLUSIONS OF LAW:**

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

An employer has the right to expect decency and civility from its employees. Use of profanity or offensive language in a confrontational, disrespectful, or name-calling context, may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made. The question of whether the use of improper language in the workplace is misconduct is nearly always a fact question. It must be considered with other relevant factors, including the context in which it is said, and the general work environment. See Myers v Employment Appeal Board, 462 N.W.2d 734, 738 (Iowa Ct. App. 1990).

The evidence indicates that Mr. Hester's use of profanity during the third week of June 2007 was an isolated outburst provoked by a difficult, irate customer who berated Mr. Hester over the course of several minutes with profanity-laced statements about Mr. Hester, about Wal-Mart employees generally, and about Wal-Mart generally. The evidence indicates that Mr. Hester demonstrated extremely poor judgment by ultimately responding in kind to the customer's remarks. The evidence shows that Mr. Hester exercised poor judgment by waiting too long to summon a manager to deal with the out-of-control customer. Though Mr. Hester's utterance was inappropriate, the context of outburst persuades that administrative law judge that this isolated incident does not rise to the level of substantial misconduct and should not disqualify Mr. Hester from receiving unemployment insurance benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Hester was discharged for no disqualifying reason. Accordingly, Mr. Hester is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Hester.

**DECISION:**

The Agency representative's January 23, 2008, reference 03, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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