

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUSTIN D WILLIAMS

Claimant

APPEAL NO. 09A-UI-05412-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

**Original Claim: 03/01/09
Claimant: Respondent (2-R)**

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 23, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 4, 2009. Claimant Justin Williams participated. Jeffrey Bower, Assistant Manager, represented the employer. Exhibits One, Five, Six, and Eight were received 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: Justin Williams was employed by Wal-Mart as a full-time overnight stockman from May 2006 until February 20, 2009, when Assistant Managers Chris Laudon and Jeffrey Bower suspended him from the employment. Mr. Bower subsequently discharged Mr. Williams from the employment on February 25, 2009.

The incident that prompted the suspension and discharge came to the employer's attention a day or two prior to the suspension February 20. A couple weeks before the suspension, while on his lunch break, Mr. Williams removed a Valentine's Day greeting card from the shelf on the sales floor and recorded a vulgar audio message on the card, which was designed to hold an audio message. The message was, "I want to f—k you like a hurricane." After Mr. Williams recorded the message he returned the card to the shelf on the sales floor. The message played for a customer when the customer opened the card. The customer provided the card to the customer service manager, who brought the card to the attention of Mr. Bower. Mr. Bower and other managers listened to the card and concluded the person on the card was Mr. Williams.

On February 20, Mr. Bower and Mr. Laudon interviewed Mr. Williams about the matter. Mr. Bower asked Mr. Williams what he knew about the card. Mr. Williams told Mr. Bower that he had recorded the message and that he knew it was a stupid thing to do. Mr. Bower told Mr. Williams that Mr. Williams was suspended until Mr. Bower could meet with the store

manager to make a decision about Mr. Williams continued employment. On February 25, Mr. Williams returned to the store for a meeting, at which time Mr. Bowers discharged him and completed the exit interview process.

Mr. Williams was aware of and had received training concerning the employer's policy against profanity in the workplace.

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).

The evidence in the record establishes misconduct in connection with the employment. The weight of the evidence indicates that Mr. Williams intentionally recorded a vulgar, offensive, and profane message on a greeting card and then returned the card to the sales shelf where a customer would open and listen to the card. The evidence indicates that Mr. Williams was well aware that such conduct was prohibited by the employer and aware that such conduct would trigger disciplinary action. The conduct not only violated the employer's policy against profanity, it also involved offensive conduct directed at the employer's customers. Mr. Williams' assertion that he "was not a Wal-Mart employee" at the time of the conduct because it occurred on his lunch break is wholly without merit.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Williams was discharged for misconduct. Accordingly, Mr. Williams is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Williams.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's March 23, 2009, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw