

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JAMES BERRINGER**

Claimant

**APPEAL NO: 10A-UI-03338-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**

Employer

**OC: 01-24-10**

**Claimant: Respondent (2R)**

Section 96.5-2-a – Discharge/Misconduct

Section 96.3-7 – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the February 16, 2010, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on April 15, 2010. The claimant participated in the hearing. Dan Brunner, Store Manager, participated in the hearing on behalf of the employer. Employer's Exhibit One 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 full-time unloader for Wal-Mart from December 13, 2008 to January 25, 2010. On January 23, 2010, the claimant and another associate were working on a display when the other associate dropped his end and a piece of the steel fixture fell and struck a customer. The customer was very upset and the claimant felt the customer was blaming him for the incident so he became very confrontational with the customer. Assistant Manager Janna Ostdiek intervened and was speaking to the customer and his family after moving them to a more secluded area when the claimant came up behind Ms. Ostdiek and started pointing at the guest stating, "You know, I don't know why he was so rude to me! I didn't do anything!" and restarted the confrontation (Employer's Exhibit One). Ms. Ostdiek immediately told the claimant to go outside, "go away" but instead of doing so the claimant continued yelling at the guest telling him how rude he was (Employer's Exhibit One). The guest was getting "more upset and yelling back at James" (Employer's Exhibit One). Ms. Ostdiek got "very close" to the claimant and told him to go outside and he eventually did so (Employer's Exhibit One). On January 25, 2010, Store Manager Dan Brunner met with the claimant about the incident and noted the claimant showed "no remorse" and stated the employer was "lucky" he had not hit the customer, stating if it would have happened one year ago he would have lost his temper and hit him. Mr. Brunner explained how the situation should have been handled and that it was "completely

unnecessary” for him to leave and then return and reenter the conversation with the customer. At that time Mr. Brunner informed him the employer was terminating his employment

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

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

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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 proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant's actions in arguing with and yelling at the customer after the customer was hit by a steel fixture and was understandably upset was completely inappropriate. Additionally, after being told to get away from the customer he came back and continued the confrontation. While the claimant was “proud of (himself)” for not hitting the customer because he would have done so one year ago, it is not unreasonable for the employer to expect that not only would its employee never hit a customer but that he would not yell at and perpetuate a confrontation with any customer, let alone one who was just struck by an object being handled by the claimant and another associate. Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard

of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

The unemployment insurance law 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. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

**DECISION:**

The February 16, 2010, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as 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 claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

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