

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

KEVIN K CLARK
218 MITCHELL ST SW
CEDAR RAPIDS IA 52404

WAL-MART STORES INC
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-10882-RT
OC: 02-08-04 R: 03
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefit

STATEMENT OF THE CASE:

The employer, Wal-Mart Stores, Inc., filed a timely appeal from an unemployment insurance decision dated September 30, 2004, reference 03, allowing unemployment insurance benefits to the claimant, Kevin K. Clark. After due notice was issued, a telephone hearing was held on November 1, 2004, with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where he or any of his witnesses could be reached for the hearing, as instructed in the notice of appeal. Steven Swift, Assistant Manager, at the employer's store in Cedar Rapids, Iowa, participated in the hearing for the employer. Employer's Exhibits 1 and 2 were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time sales floor associate from approximately March 2004 until he was discharged on August 21, 2004. The claimant had also been previously employed by the employer beginning on June 23, 2000 until he was discharged on January 25, 2004. The claimant was discharged on August 21, 2004 for using profanity to an associate when he told the associate to "fuck off." The employer has rules in its handbook prohibiting the use of profanity and indicating that certain actions may result in immediate termination including rude or abusive conduct toward a customer or associate as shown at Employer's Exhibit 1. The claimant received a copy of this policy and signed an acknowledgement also as shown Employer's Exhibit 1. The claimant had been previously warned about inappropriate comments unsuitable for the workplace by a written warning on June 30, 2003 as shown at Employer's Exhibit 2 when he was initially employed by the employer.

Pursuant to his claim for unemployment insurance benefits filed effective February 8, 2004 and reopened effective September 12, 2004, the claimant has received unemployment insurance benefits in the amount of \$516.00 as follows: \$258.00 per week for two weeks, benefit weeks ending September 18 and 25, 2004.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer's witness, Steven Swift, Assistant Manager for the Cedar Rapids, Iowa, store, credibly testified, and the administrative law judge concludes, that the claimant was discharged on August 21, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. Mr. Swift credibly testified that the claimant used profane language directed toward an associate when he told the associate to, "fuck off." The employer has rules prohibiting such profanity and being rude or abusive to a customer or associate and provides that a violation of that rule can result in immediate termination. The claimant got a copy of these policies as shown at Employer's Exhibit 1. The claimant was also given a written Coaching for Improvement form at Employer's Exhibit 2 on June 30, 2003 for inappropriate comments that are unsuitable for the workplace.

Because of the employer's clear policy and the claimant's prior warning, the administrative law judge concludes that the claimant's behavior here in using the profane words directed to an associate was a deliberate act or omission constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evinces a willful or wanton disregard of the employer's interests and, at the very least, is carelessness or negligence in such a degree of recurrence all as to establish disqualifying misconduct. Further, in Myers v. Employment Appeal Board, 462 N.W.2d 734, 738 (Iowa App. 1990), the Iowa Court of Appeals held that the 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. Here, the claimant clearly used profanity and offensive language in a disrespectful manner and the target was present and it does not appear that this was an isolated incident. Accordingly, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he qualifies for such benefits.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal

to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$516.00 since separating from the employer herein on or about August 21, 2004 and reopening his claim for benefits effective September 12, 2004, to which he is not entitled and for which he is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision dated September 30, 2004, reference 03, is reversed. The claimant, Kevin K. Clark, is not entitled to receive unemployment insurance benefits until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. He has been overpaid unemployment insurance benefits in the amount of \$516.00.

kjf/tjc