

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

**SUSANNA HARRISON**

Claimant

**APPEAL NO. 14A-UI-07183-BT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**

Employer

**OC: 06/15/14**

**Claimant: Respondent (2)**

Iowa Code § 96.5(2)(a) - Discharge for Misconduct

Iowa Code § 96.3-7 - Overpayment

**STATEMENT OF THE CASE:**

Wal-Mart Stores, Inc. (employer) appealed an unemployment insurance decision dated July 3, 2014, (reference 01), which held that Susanna Harrison (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 5, 2014. The claimant did not comply with the hearing notice instructions and did not call in to provide a telephone number at which she could be contacted, and therefore, did not participate. The employer participated through Personnel Manager Marilyn Powers, Shift Manager Andy Surat, and Employer Representative Ryan Flanery. Employer's Exhibits One through Three were admitted into evidence.

**ISSUE:**

The issues are whether the claimant is disqualified for benefits, whether she was overpaid unemployment insurance benefits, whether she is responsible for repaying the overpayment and whether the employer's account is subject to charge.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant worked as a part-time backroom associate from March 7, 2013, through June 17, 2014, when she was discharged for excessive unexcused absenteeism. The employer's attendance policy provides that employees can be terminated for having over six unexcused absences in a six-month period and/or for any absences after the receipt of three written warnings.

The claimant received her first written warning for absenteeism on September 13, 2013. She received her second written warning for absenteeism on January 8, 2014. She signed for this warning issued by Manager Michael Wilcox while in the presence of witness Kara Briggs. The claimant signed and received her third written warning for absenteeism on June 10, 2014. Manager Richard Banks issued the warning in front of witness Jessica Williams. The claimant was advised that any further absences would result in her termination. She was discharged on

June 17, 2014, after she missed work on June 14, 2014, due to lack of child care. The reasons for the claimant's absences varied due to personal reasons.

The claimant filed a claim for unemployment insurance benefits effective June 15, 2014, and has received benefits after the separation from employment in the amount of \$1,223.00. The employer did not personally participate in the fact-finding interview but Employer Representative Ryan Flannery provided a letter explaining the reason for termination, as well as the same written documents which were admitted into evidence at the hearing today.

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

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-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. 871 IAC 24.32(1).

The employer has the burden to prove the discharged employee is disqualified for benefits due to work-related misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on June 17, 2014, for excessive unexcused absenteeism. Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 871 IAC 24.32(7).

The Iowa Supreme Court in the case of *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984) held that excessive unexcused absenteeism is a form of misconduct and includes tardiness, leaving early, etc. The Court in the case of *Harlan v. Iowa Department of Job Service*, 350 N.W.2d 192 (Iowa 1984) held that absences due to matters of "personal responsibility such as transportation problems and oversleeping are considered to be unexcused."

The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of absenteeism, is considered excessive. Benefits are denied.

Because the claimant has been deemed ineligible for benefits, any benefits she has received could constitute an overpayment. The unemployment insurance law requires benefits be recovered from a claimant who receives benefits from an initial decision and is later denied benefits from an appeal decision, even though the claimant acted in good faith and was not otherwise at fault. In some cases, the claimant might not have to repay the overpayment if both of the following conditions are met: 1) there was no fraud or willful misrepresentation by the claimant; and 2) the employer failed to participate in the fact-finding interview. If the overpayment is waived due to the employer's failure to participate, that employer's account continues to be subject to charge for the overpaid amount. See Iowa Code § 96.3-7.

The claimant received \$1,223.00 in unemployment insurance benefits. The benefits were not received due to fraud or willful misrepresentation and the employer witness did not personally participate in the fact-finding interview. However, the employer representative sent in detailed written documentation which contained factual information regarding the reasons for the discharge. The information provided was of the quantity and quality that, if unrebutted, would

be sufficient to result in a decision favorable to the employer. In accordance with the Agency definition of participation, the employer participated in the fact-finding interview and its account is not subject to charge. See 871 IAC 24.10. Consequently, a waiver cannot be considered and the claimant is responsible for repaying the overpayment amount of \$1,223.00.

**DECISION:**

The unemployment insurance decision dated July 3, 2014, (reference 01), is reversed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant was overpaid \$1,223.00 in benefits and she must repay those benefits.

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Susan D. Ackerman  
Administrative Law Judge

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Decision Dated and Mailed

sda/pjs