

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SALLY A OUDERKIRK
Claimant

APPEAL NO. 09A-UI-04540-AT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PETSMART INC
Employer

OC: 02/15/09
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Petsmart, Inc. filed a timely appeal from an unemployment insurance decision dated March 12, 2009, reference 01, that allowed benefits to Sally Ouderkirk. After due notice was issued, a telephone hearing was held April 15, 2009 with Ms. Ouderkirk participating and presenting additional testimony by Terri Leathers. Store Manager Mark Fox and Operations Manager Jessica Nachowitz participated for the employer. Employer Exhibit One was admitted into evidence.

ISSUE:

Was the claimant discharged for misconduct?

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Sally A. Ouderkirk was employed by Petsmart, Inc. from January 21, 1997 until she was discharged February 19, 2009. She last worked as store operations manager. On February 7, 2009 Ms. Ouderkirk used a company credit card to purchase pizza as a reward for the staff. Store Manager Mark Fox learned of this during the week of discharge.

Mr. Fox had called a manager meeting for January 19, 2009. He specifically told the managers at the meeting that use of the company card for purchases such as food for employees was forbidden. Ms. Ouderkirk signed a statement on February 19, 2009 that Mr. Fox had directly told her not to do so but that she bought food anyway because she did not listen to him.

Ms. Ouderkirk has received unemployment insurance benefits since filing a claim effective February 15, 2009.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence establishes that the claimant was discharged for misconduct in connection with her employment. It does.

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.

While Ms. Ouderkirk wrote on her discharge statement that she did not "remember" being at a manager meeting, she also made a written statement that Mr. Fox had told her directly not to use the card for food purchases for staff. Whether or not she attended the meeting on January 19, her own statement establishes that she knew that she was not to make the type of purchase that she made on February 7. The administrative law judge concludes from the evidence that Ms. Ouderkirk willfully violated company policy by making the purchase. Benefits are withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The question of whether the claimant must repay benefits already received is remanded to the Unemployment Insurance Services Division.

DECISION:

The unemployment insurance decision dated March 12, 2009, reference 01, is reversed. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The question of repayment of benefits is remanded to the Unemployment Insurance Services Division.

Dan Anderson
Administrative Law Judge

Decision Dated and Mailed

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