

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

RAFET MIFTARI
2905 PAYNE RD
DES MOINES IA 50310

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

Appeal Number: 04A-UI-09292-RT
OC: 07/11/04 R: 02
Claimant: Respondent (1)

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 Benefits

STATEMENT OF THE CASE:

The employer, Wal-Mart Stores, Inc., filed a timely appeal from an unemployment insurance decision dated August 17, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Rafet Miftari. After due notice was issued, a telephone hearing was held on September 23, 2004, with the claimant participating. Carl Fitzgerald, Store Manager for the employer's store in Windsor Heights, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Employer's Exhibit One was admitted into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibit One, the administrative law judge finds: The claimant was employed by the employer as a full time meat department merchandiser from November 22, 1997 until he was discharged on July 3, 2004. The claimant was discharged for allegedly processing meat product out of date. The employer has a rule as set out in Employer's Exhibit One that meat products must be processed and sold one day prior to the actual expiration date of such meat product. Otherwise, the meat must be discarded. On June 28, 2004, the claimant was not processing meat. On June 29, 2004, a co-worker of the claimant asked for the claimants help in processing certain meat, mainly packaging the meat. The claimant did so. Although the meat was to have expired on June 29, 2004 and under the employer's policies could not be processed after June 28, 2004, the meat manager had added an additional ten days to the meat so that on June 29, 2004 the meat was not out of date for nine more days. Processing of out of date meat is prohibited in Employer's Exhibit One, a copy of which the claimant received and of which he was aware. Employees are allowed to process product for themselves as long as that product is not out of date. When a product is out of date it should be destroyed. The claimant had received no warnings or disciplines for this behavior nor had he ever been accused of such behavior in the past.

Pursuant to his claim for unemployment insurance benefits filed effective July 11, 2004, the claimant has received unemployment insurance benefits in the amount of \$4,572.00 as follows: \$381.00 per week for twelve weeks from benefit week ending July 17, 2004 to benefit week ending October 2, 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 not.
2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

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 parties testified, and the administrative law judge concludes, that the claimant was discharged on July 3, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has a burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witness, Carl Fitzgerald, Store Manager at the employer's store in Windsor Heights, credibly testified that the claimant and a co-worker were processing meat on June 28, 2004 which meat was to expire under the employer's policy on that date. The employer advances the out of date product one day so the meat actually had an expiration date of June 29, 2004. Mr. Fitzgerald also credibly testified that the claimant and the co-worker did not finish processing that meat and therefore finished it the next day, June 29, 2004 which would make the meat products out of date. However, Mr. Fitzgerald's testimony is all hearsay. The claimant credibly testified that he did not process any meat on June 28, 2004 and on June 29, 2004 was asked by a co-worker to assist him in processing meat and all the claimant did was package it. The claimant also credibly testified that the meat manager had added an additional ten days to the expiration date of the meat leaving nine days left on the expiration on June 29, 2004. The administrative law judge must conclude here that the claimant's direct testimony outweighs the hearsay testimony of Mr. Fitzgerald. The meat manager did not testify. Under the evidence here, the administrative law judge is constrained to conclude that there is not a preponderance of the evidence that the claimant committed any deliberate act constituting a material breach of his duties or that evinced a willful or wanton disregard of the employer's interests and therefore the claimant's actions are not disqualifying misconduct for those reasons. The claimant was adamant that his meat manager had advanced the date of the expiration and that he was following the meat manager's instructions. The claimant credibly testified that the meat manager had told the claimant to help the co-worker. The claimant denies processing meat for his own purchase.

The more difficult question here is whether the claimant's acts were carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. Here, the administrative law judge concludes that the claimant's acts do not establish such carelessness

or negligence. The evidence does establish that the claimant knew that the meat product was to expire on June 29, 2004 but was told nevertheless by his meat manager to process it when the meat manager advanced the expiration date. The claimant was aware of the employer's policies at Employer's Exhibit One that prohibit out of date meat product from being processed. The claimant probably should have consulted someone else when the meat manager instructed him to process the meat. This is negligence or carelessness. However, the claimant had never received any warnings or disciplines for this behavior nor had he ever been accused of it before. The administrative law judge understands why employees would follow the instructions of their manager. Therefore, the administrative law judge concludes that at most, the claimant's acts were ordinary negligence in an isolated instance or a good faith error in judgment or discretion and is not disqualifying misconduct. The administrative law judge in no way condones the processing of out of date product, especially meat products, but is constrained to conclude here that there is not a preponderance of the evidence that claimant actually did so willfully or deliberately or with recurring carelessness or negligence.

In summary, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant the denial of unemployment insurance benefits and misconduct to support a disqualification for unemployment insurance benefits must be substantial in nature including the evidence therefore. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. The administrative law judge specifically notes that the claimant had been employed by the employer for almost seven years without any relevant warnings or disciplines. Unemployment insurance benefits are allowed to the claimant provided he is otherwise eligible.

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 \$4,572.00 since separating from the employer herein on or about July 3, 2004 and filing for such benefits effective July 11, 2004. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision dated August 17, 2004, reference 01, is affirmed. The claimant, Rafet Miftari, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

kjf/kjf