

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LEOLA WILLITS

Claimant

APPEAL NO: 10A-UI-06989-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 04-04-10

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 April 28, 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 June 29, 2010, and continued August 9, 2010. The claimant participated in the hearing. Robert Perryman, Store Manager; Michael Dendinger, Shift Manager; Marilyn Vaughn, Training Coordinator; and Jillian Britt, Personnel Coordinator, participated in the hearing on behalf of the employer with Attorney Todd West. Employer's Exhibits One through Twelve were 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 a full-time vision center assistant manager for Wal-Mart from July 13, 2002 to April 7, 2010. Employees who work an eight-hour shift are required to take a 30-minute lunch break during the first six hours of their shift or their actions are considered a meal exception wherein they did not take their break during the required time period. On October 9, 2008, the claimant received a verbal warning for the second time for a meal exception. On March 11, 2010, the claimant failed to take her lunch break within the required first six hours of her shift (Employer's Exhibit Five). On March 12, 2010, her lunch break was changed on the computer to show she took a lunch break right at the six-hour mark of her shift (Employer's Exhibit Five). The employer's Electronic Time Adjustment History flagged the changes made to the claimant's "current punch" time March 12, 2010, for the March 11, 2010, lunch break (Employer's Exhibit One). Consequently, Shift Manager Michael Dendinger began an investigation into the incident. He reviewed the video surveillance tape of the vision center and found the claimant said she went to lunch at 1:25 p.m. but according to the video she did not leave the vision center until 1:36 p.m. The current time punch showed a difference of 14 minutes (Employer's Exhibit One). After reviewing the situation and conducting an eight-day investigation that went up to the claimant's regional manager, the employer sent the information

to the Employer Advisory Service March 30, 2010. On April 6, 2010, the Employer Advisory Service requested an exit interview from the claimant which was done April 7, 2010, and the claimant's employment was terminated at that time.

The claimant has claimed and received unemployment insurance benefits since her 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.

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 has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). While the claimant denies the meal exception policy as defined by the employer even exists, the employer credibly testified to the policy and the claimant did receive a verbal warning that referred to a previous counseling regarding her violation of that policy which indicates she was aware of the policy. The claimant failed to take her lunch break within the first six hours of her shift March 11, 2010, and changed her lunch

break time to reflect she actually took her break right at the six-hour mark on her timesheet March 12, 2010. If the claimant had simply taken the meal exception and explained the situation to the employer she would most likely have received a decision-making day but her employment would not have been terminated. Because she altered her timesheet, however, the employer felt it had no choice but to terminate her employment. 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 April 28, 2010, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as 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 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.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css