

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TYLER S NIERNBERGER
Claimant

APPEAL NO. 09A-UI-10692-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

**Original Claim: 05/31/09
Claimant: Respondent (2-R)**

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from a representative's decision dated July 14, 2009, reference 01, that held the claimant eligible for unemployment insurance benefits. After due notice was issued, a telephone conference hearing was scheduled for and held on August 11, 2009. Although duly notified, the claimant did not participate. The employer participated by Joyce Gitch, market human resource manager, and Thomas Pelzer, store manager.

ISSUES:

At issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment insurance benefits and whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: The claimant was employed by Wal-Mart Stores from February 3, 2007, until June 16, 2009, when he was discharged from employment for violation of a last-chance work agreement. Mr. Niernberger held the position of full-time assistant manager. His immediate supervisor was Thomas Pelzer, store manager.

The claimant was separated from his employment with Wal-Mart Stores after he admitted an addiction to prescription pain pills. Mr. Niernberger entered into a "last chance agreement" with Wal-Mart Stores. Under the terms of the agreement, Mr. Niernberger agreed to seek and accept intensive outpatient treatment for his addictions and to abide by the terms of the treatment or be discharged from employment. When it was determined that the claimant had not abided by the agreement by completing the treatment agreed upon between the parties, he was discharged from employment and his position was filled.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the employer has sustained its burden of proof in establishing misconduct sufficient to warrant the denial of unemployment insurance benefits.

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.

The evidence in the record establishes that the claimant was discharged after he failed to abide by the terms of a "last chance agreement" to maintain his employment with Wal-Mart Stores. The claimant had admitted a narcotic addiction and had agreed to enter intensive outpatient treatment and to abide by the requirements of the treatment in order to remain employed by Wal-Mart Stores. Mr. Niernberger was discharged when he did not abide by the treatment requirements as agreed. There being no evidence to the contrary, the administrative law judge concludes that the testimony of the employer's witness is credible and is not inherently improbable. The employer has sustained its burden of proof by a preponderance of the evidence. 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 issue of whether the claimant must repay the unemployment insurance benefits he has received is remanded to the Unemployment Insurance Services Division for a determination.

DECISION:

The representative's decision dated July 14, 2009, reference 01, is reversed. Tyler Niernberger is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible. The issue of whether the claimant must repay the unemployment insurance benefits he has received is remanded to the Unemployment Insurance Services Division for a determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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