

**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**

**GEORGE W FLICK
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206 BENTON ST NW
BLAIRSTOWN IA 52209-0006**

**WAL-MART STORES INC
C/O TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283**

**Appeal Number: 04A-UI-08528-RT
OC: 07-11-04 R: 03
Claimant: Respondent (2)**

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 July 29, 2004, reference 01, allowing unemployment insurance benefits to the claimant, George W. Flick. After due notice was issued, a telephone hearing was held on August 30, 2004, with the claimant not participating. Although the claimant had called in a telephone number where he purportedly could be reached for the hearing, when the administrative law judge called that number at 3:01 p.m., he reached the claimant's mother. She informed the administrative law judge that the claimant was not home but that he was at work. The administrative law judge requested a number for the claimant at work and the

mother had no such number. The administrative law judge informed the claimant's mother that he was going to proceed with the hearing and if the claimant wanted to participate, he needed to call before the hearing was over and the record was closed. The hearing began when the record was opened at 3:04 p.m. and ended when the record was closed at 3:23 p.m. and the claimant had not called during that time. Timothy Timmer, District Loss Prevention Supervisor, and Greg Cason, Store Manager of a store in Cedar Rapids, Iowa, participated in the hearing for the employer. Employer's Exhibit 1 was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibit 1, the administrative law judge finds: The claimant was employed by the employer as a full-time bottle redemption associate from July 2, 1999 until he was discharged on July 9, 2004. The claimant's main duties were to collect pop cans and bottles at machines designed for recycling of the empty pop cans or bottles. Part of his duties also involved loading the pop machines at the employer's location with pop. This entails getting a key to open the machines and refill the machines. However, the claimant is not authorized nor is the claimant permitted to have a second key that opens the cash or money area of the pop machines. Obtaining the cash from the pop machines is a responsibility of the cash office. The claimant is not authorized or permitted to even have a key to the cash area of the pop machines. On July 7 and 8, 2004, the claimant was observed on a videotape opening the cash areas of pop machines where he was not supposed to be and had no business being. The claimant was confronted on July 9, 2004 and denied ever opening the cash areas of the pop machines and denied having keys to such areas but conceded that he knew he was not supposed to have such keys and he knew further that he was not supposed to enter such cash areas. Because the claimant had been observed on the videotape opening such areas and lied to the employer when confronted, the claimant was discharged. The claimant had received a warning on July 1, 2004 after leaving the pop machine open but this was opened only to the area of re-loading pop bottles and cans which the claimant was authorized to do and for which he had a key. Pursuant to his claim for unemployment insurance benefits filed effective July 11, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,799.00 as follows: \$299.00 for benefit week ending July 17, 2004 (earnings \$88.00); \$310.00 for benefit week ending July 24, 2004 (zero earnings); \$299.00 for benefit week ending July 31, 2004 (earnings \$88.00); \$271.00 for benefit week ending August 7, 2004 (earnings \$116.00); and \$310.00 per week for two weeks, benefit weeks ending August 14, and 21, 2004.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from the employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

The employer's witnesses testified and the administrative law judge concludes that the claimant was discharged on July 9, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of

proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's main witness, Timothy Timmer, District Loss Prevention Supervisor, credibly testified that the claimant was observed on a videotape opening the cash area of pop machines on July 7 and 8, 2004 without authorization or permission. The claimant is not authorized or permitted to have a key to the cash area of the pop machines. When the claimant was confronted about this on July 9, 2004, the claimant conceded that he was not authorized to enter the cash area and further conceded that he is not supposed to have any keys but denied entering the cash area or having a key. However, Mr. Timmer's testimony was credible that he observed claimant on the videotape opening the cash areas. The claimant's only responsibility for the pop machines is to open the pop machines so as to get access to the loading area only, which is a different key than to the cash area, and then seeing that the pop machines are loaded. The key to the cash area and the responsibility for removing the cash is up to the cash office and not the claimant's responsibility. The claimant had just received a warning on July 1, 2004 about leaving the pop machine open to the reloading area. In the absence of any evidence to the contrary, the administrative law judge is constrained to conclude that claimant did have access to the keys to the cash area of pop machines without authorization and further entered such areas without authorization knowing that he did not have such authorization and then lying about this to the employer and such acts are deliberate acts or omissions constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evince a willful or wanton disregard of the employer's interests and, at the very least, are carelessness or negligence in such a degree of recurrence all as to establish disqualifying misconduct.

In summary, and for all of the reasons set out above, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

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 \$1,799.00 since separating from the employer herein on or about July 9, 2004 and filing for such benefits effective July 11, 2004, to which he is not entitled and for which he is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of July 29, 2004, reference 01, is reversed. The claimant, George W. Flick, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. The claimant has been overpaid unemployment insurance benefits in the amount of \$1,799.00.

pjs/kjf