

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

GLEN A NICHOLS
106 EAST ST
WIOTA IA 50274

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

AMENDED

Appeal Number: 06A-UI-01140-JTT
OC: 01/01/06 R: 01
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

STATEMENT OF THE CASE:

Wal-Mart filed a timely appeal from the January 18, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 14, 2006. Claimant Glen Nichols participated. Co-Manager Scott Stewart represented the employer and presented additional testimony through Assistant Manager Bethany Opbroek. Exhibits One, Two, and Five through Eight were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Glen Nichols was employed by Wal-Mart as a full-time stocking associate from February 25, 2005 until December 5, 2005, when Co-Manager Scott Stewart discharged him.

The final incident that prompted the discharge occurred on December 5, 2005. Co-Manager Scott Stewart was giving Mr. Nichols a work assignment when he noted that Mr. Nichols' speech was slurred and that Mr. Nichols smelled of alcohol. Mr. Stewart suspected that Mr. Nichols was under the influence of alcohol.

Mr. Stewart summoned Mr. Nichols to a meeting in the manager's office. Assistant Manager Bethany Opbroek was also present. Once Mr. Nichols was in the manager's office, Mr. Stewart observed that Mr. Nichols' speech continued to be slurred, that Mr. Nichols smelled of alcohol, and that Mr. Nichols was staggering. Mr. Nichols initially admitted to consuming three beers prior to coming to work, but later admitted to consuming six beers prior to coming to work. Mr. Stewart asked Mr. Nichols to submit to an alcohol test. Mr. Nichols refused and indicated it was against his policy to submit to such a test. Mr. Nichols further indicated that any such test would indicate he was under the influence of alcohol. Mr. Stewart asked Mr. Nichols three times to submit to an alcohol test, but Mr. Nichols refused each request.

Wal-Mart has a written alcohol and drug abuse policy that prohibits employees from reporting to work under the influence of alcohol and indicates that such conduct will be grounds for immediate termination. The written policy provides for reasonable suspicion alcohol testing. The written policy further indicates that a refusal to submit to an alcohol test will be grounds for termination. Mr. Nichols signed his acknowledgment of the alcohol and drug abuse policy on February 25, 2005.

Mr. Stewart discharged Mr. Nichols based on his refusal to submit to the alcohol test.

Mr. Nichols established a claim for benefits that was effective January 1, 2006 and has received benefits totaling \$1,521.00.

REASONING AND CONCLUSIONS OF LAW:

The question is whether Mr. Nichols was discharged for misconduct based on the refusal to submit to "reasonable suspicion" alcohol testing.

Iowa Code section 730.5 grants a private sector employer the right to conduct "reasonable suspicion" drug or alcohol testing. See Iowa Code section 730.5(8)(c). "Reasonable suspicion drug or alcohol testing" means drug or alcohol testing based upon evidence that an employee is using or has used alcohol or other drugs in violation of the employer's written policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. Such facts and/or inferences may be based upon, but not limited to (1) observable phenomena while at work such as direct observation of alcohol or drug use or abuse or *other physical symptoms or manifestations of being impaired due to alcohol or other drug use*; (2) abnormal conduct or erratic behavior while at work or significant deterioration in work performance; (3) a report of alcohol or other drug use provided by a reliable and credible source. See Iowa Code section 730.5(1)(h). There are additional bases under section 730.5(1)(h) for requesting a test, but they do not apply to the facts of this case.

The evidence in the record indicates that the employer complied with the statutory requirements for requesting that Mr. Nichols submit to "reasonable suspicion" alcohol testing. The employer had reasonable suspicion that Mr. Nichols was under the influence of alcohol. The employer had smelled alcohol emitting from Mr. Nichols' person. The employer had observed slurred speech and staggering. Mr. Nichols had admitted to consuming six beers prior to coming to

work. The evidence further indicates that Mr. Nichols refused to submit to an alcohol test and that he was discharged from the employment based on the refusal to submit.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Nichols was discharged for misconduct in connection with the employment. Accordingly, Mr. Nichols is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged.

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 \$1,521.00 in benefits Mr. Nichols has received constitutes an overpayment that the law requires Mr. Nichols to repay to Iowa Workforce Development.

DECISION:

The Agency representative's decision dated January 18, 2006, reference 01, is reversed. The claimant was discharged from the employment for misconduct. The claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. The employer's account will not be charged. The claimant is overpaid \$1,521.00.

jt/kjw/kkf