

**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**

**JERRY L NELSON
1406 E 22ND ST APT 204
ATLANTIC IA 50022-2896**

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

**Appeal Number: 06A-UI-04191-RT
OC: 03/19/06 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 of Benefits

STATEMENT OF THE CASE:

The employer, Wal-Mart Stores, Inc., filed a timely appeal from an unemployment insurance decision dated April 4, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Jerry L. Nelson. After due notice was issued, a telephone hearing was held on May 3, 2006, with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where he or any of his witnesses could be reached for the hearing, as instructed in the notice of appeal. In addition to the notice of appeal, the claimant received documents for the hearing from the Appeals Section as well as several packets of documents from the employer. Gregg James, Assistant Manager of Store No. 3394 in Atlantic, Iowa, where the claimant was employed, participated in the hearing for the

employer. Employer's Exhibits One and Two were 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 witness and having examined all of the evidence in the record, including Employer's Exhibits One and Two, the administrative law judge finds: The claimant was employed by the employer, most recently as an in-stock supervisor, from February 22, 2005, until he was discharged on March 12, 2006. The claimant was discharged for violating the employer's policies about breaks and lunch periods. The claimant took an extra extended break which was not authorized or permitted by the employer's policies. According to the employer's policies at Employer's Exhibit One, an employee such as the claimant, who works an eight hour shift, is entitled to two 15 minute breaks and one, one hour lunch. The employees clock out for the lunch breaks but do not clock out for the 15 minute breaks. These policies concerning breaks and meal periods were reviewed with the claimant at hire, also as shown at Employer's Exhibit One. On March 12, 2005, the claimant started work, as he always did, at 7:00 a.m. At 8:15 a.m. the claimant took a 30 minute break which was observed by the employer's witness, Gregg James, Assistant Manager. The claimant then took a second break in the morning from 10:00 a.m. to 10:15 a.m. Mr. James also observed the claimant doing this break. The claimant then took a lunch break from 11:30 a.m. to 12:30 p.m. according to the employer's records for clocking in and out on that day. Mr. James then confronted the claimant and the claimant admitted to taking an extra long break but gave no reason. The claimant was then discharged. The claimant received a decision-making day on October 11, 2005 as shown at Employer's Exhibit Two for not completing a job properly when a tire fell off of an automobile on which he was supposed to be placing the tire. According to the employer's disciplinary policy, upon the next violation, following a decision-making day, a discharge is required. The claimant was then discharged for taking the extra long break at 8:15 a.m. in the morning on March 12, 2005.

Pursuant to his claim for unemployment insurance benefits filed effective March 19, 2006, the claimant has received unemployment insurance benefits in the amount of \$1,590.00 as follows: \$265.00 per week for six weeks from the benefit week ending March 25, 2006 to the benefit week ending April 29, 2006.

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.
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

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 employer's witness, Gregg James, Assistant Manager, credibly testified, and the administrative law judge concludes, that the claimant was discharged on March 12, 2006. 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. Mr. James credibly testified that on March 12, 2006, the claimant took an extra and extended break for 30 minutes beginning at 8:15 a.m. and then a second break at 10:00 a.m. until 10:15 a.m. The employer's policies are quite clear as shown at Employer's Exhibit One that an employee is entitled to only two 15 minute breaks in an eight hour day as well as a one hour lunch. The claimant also took his one hour lunch from 11:30 a.m. to 12:30 p.m. These rules were reviewed with the claimant at orientation as shown also at Employer's Exhibit One. Clearly the claimant had at least an extended break of 15 minutes more than allowed by the employer and probably an extra break because the claimant still was entitled or may have taken a break in the afternoon of March 12, 2005 but he was discharged before he could do so. The claimant had previously received a decision-making day as shown at Employer's Exhibit Two. When confronted about this, the claimant admitted to taking an extra long break but gave no reason. According to the employer's disciplinary policy the next step after the decision-making day on October 11, 2005, required a discharge. Accordingly, in the absence of any evidence to the contrary, the administrative law judge concludes that the claimant's taking an extra long break was a deliberate act or omission constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evinces a willful or wanton disregard of the employer's interests and is, at the very least, carelessness or negligence in such a degree of recurrence, all as to establish disqualifying misconduct. When the claimant received the decision-making day, although it was for different behaviors, the claimant was apprised that he needed to govern his behavior properly and he did not and he was discharged. Therefore, 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 \$1,590.00 since separating from the employer herein on or about March 12, 2006 and filing for such benefits effective March 19, 2006. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance the provisions of Iowa law.

DECISION:

The representative's decision of April 4, 2006, reference 01, is reversed. The claimant, Jerry L. Nelson, is not entitled to receive unemployment insurance benefits, until, or unless, he requalifies for such benefits, because he was discharged for disqualifying misconduct. He has been overpaid unemployment insurance benefits in the amount of \$1,590.00.

cs/tjc