

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GARRETT I WITTENBURG
Claimant

APPEAL NO: 07A-UI-01499-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 01/07/07 R: 03
Claimant: Respondent (2)

Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc. (employer) appealed a representative's January 30 2007 decision (reference 01) that concluded Garrett I. Wittenburg (claimant) was qualified to receive unemployment insurance benefits, and the employer's account was subject to charge because the claimant had been discharged for non disqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 26, 2007. The claimant failed to respond to the hearing notice by contacting the Appeals Section prior to the hearing and providing the phone number at which he could be contacted to participate in the hearing. As a result, no one represented the claimant. Ed Duran, an assistant manager, appeared on the employer's behalf. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Did the employer discharge the claimant for work-connected misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

The claimant started working for the employer in May 2006. The claimant worked part time unloading merchandise. Duran supervised the claimant.

During his employment, the employer counseled the claimant about his attendance. On October 29, 2006, the employer gave the claimant a final written warning or a decision day for the way the claimant interacted with his co-workers when he engaged in horseplay. The employer gave the claimant the October warning because he had blown an air horn in an associate's ear. When the claimant came back to work after his decision day, he indicated he was sorry and realized he had not respected other employees when he engaged in this type of childish behavior. The employer informed the claimant that if there were problems of a similar nature again he could be discharged.

On November 25, an associate reported the claimant sprayed body spray on the associate's sunflower seeds. When the associate brought the sunflower seeds to manager, the sunflower seeds had a strong vanilla odor. Associates reported the claimant had sprayed the seeds with a body spray. On November 28, 2006, when the employer talked to the claimant about the associate's sunflower seeds, he admitted he had sprayed them with body spray. The employer discharged the claimant for again engaging in horseplay on November 25, 2006.

The claimant established a claim for unemployment insurance benefits during the week of January 7, 2007. He filed a claim for benefits for the week ending January 13, 2007. The claimant received \$146.00 in benefits for this week.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The claimant knew or should have known on October 29 his job was in jeopardy for engaging in horseplay or acting in a way that was not respectful to his co-workers. A preponderance of the evidence establishes that even though the employer warned the claimant about horseplay prior to November 25, he again engaged in similar conduct on November 25, 2006. The employer discharged the claimant on November 28 for failing to again respect his co-workers. The facts establish the employer discharged the claimant for work-connected misconduct. As of January 7, 2007, the claimant is not qualified to receive unemployment insurance benefits.

If an individual receives benefits he is not legally entitled to receive, the Department shall recover the benefits even if the individual acted in good faith and is not at fault in receiving the overpayment. Iowa Code section 96.3-7. The claimant is not legally entitled to receive benefits for the week ending January 13, 2007. The claimant has been overpaid and must repay \$146.00 in benefits he received for this week.

DECISION:

The representative's January 30, 2007 decision (reference 01) is reversed. The employer discharged the claimant for reasons that constitute work-connected misconduct. The claimant is disqualified from receiving unemployment insurance benefits as of January 7, 2007. This disqualification continues until he has been paid ten times his weekly benefit amount for insured

work, provided he is otherwise eligible. The employer's account will not be charged. The claimant is not legally entitled to receive benefits for the week ending January 13, 2007. The claimant has been overpaid and must repay \$146.00 in benefits he received for this week.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/pjs