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

GARY H SCHULTZ
522 N 3RD ST
CLINTON IA 52732-4014

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

Appeal Number: 06A-UI-00845-RT
OC: 12-18-05 R: 04
Claimant: Respondent (1)

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 January 12, 2006, reference 01, allowing unemployment insurance benefits to the claimant. Gary H. Schultz. After due notice was issued, a telephone hearing was held on February 8, 2006, with the claimant participating. Dennis Purcell, Co-Manager of the employer's store in Clinton, Iowa, where the claimant was employed, and James Barnette, Assistant Manager, participated in the hearing for the employer. Employer's Exhibit One 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 One, the administrative law judge finds: The claimant was employed by the employer as a part-time sales floor associate in the hardware department from October 15, 2004 until he was discharged on December 13, 2005. The claimant averaged between 20 and 28 hours per week. The claimant was discharged for "coaching" issues and, in particular, for a note he left for his department manager. On December 12, 2005, the claimant was working in his department, the hardware department. The assistant manager, James Barnette, one of the employer's witnesses, came up to the claimant and asked the claimant to go work in the toy department because it was a "mess" right before Christmas. The claimant asked if he could finish up what he was doing there in the hardware department and Mr. Barnette approved. Mr. Barnette then returned numerous times, perhaps as many as five times, and observed that the claimant seemed busy. Mr. Barnette would tell the claimant to go to the toy department, but the claimant would respond that he was not finished in the hardware department. Mr. Barnette first asked the claimant to go to the toy department at approximately 6:00 p.m. Finally, at 9:30 p.m., Mr. Barnette insisted that the claimant go to the toy department and he did so. The claimant then left a note for his manager, the hardware department manager, Mary Swanson. The note said something to the effect that he had ignored others, perhaps including the name of Mr. Barnette, in order to work in the hardware department, either finishing the work or getting close to finishing it. The claimant was actually referring to co-workers working nearby whom he had to ignore in order to allow him to finish his work in the hardware department so he could then go on to the toy department. In any event, Ms. Swanson passed the note on to Mr. Barnette on December 13, 2005. Mr. Barnette contacted the employer's home office and was told that the matter with the claimant was a coaching issue. Because the claimant already had a decision-making day, the claimant was discharged. When the claimant was discharged he admitted that he had written the note but indicated that he had used the wrong word when he used the word "ignoring." There was no other reason for the claimant's discharge.

There was no evidence of any relevant warnings or disciplines. The claimant received a decision-making day in March of 2005, but this was for misusing breaks and meal periods. The claimant was not discharged for these matters. Pursuant to his claim for unemployment insurance benefits filed effective December 18, 2005, the claimant has received unemployment insurance benefits in the amount of $1,088.00 as follows: $136.00 per week for eight weeks from benefit week ending December 24, 2005 to benefit week ending February 11, 2006. Of that amount, $47.00 was offset from his benefits for benefit week ending December 24, 2005, to apply to an overpayment from 2002. The claimant's overpayment balance is now zero.

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 not.

2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The parties agree, and the administrative law judge concludes, that the claimant was discharged on December 13, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6 (2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Although it is a close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. There is very little dispute as to the facts, except for the contents of the note that the claimant wrote for his department manager, Mary Swanson. On December 12, 2005, while working in the hardware department, where the claimant was assigned, he was asked several times by the assistant manager, James Barnette, one of the employer's witnesses, to go to the toy department to help out there because it was a "mess" from the Christmas sales. The claimant asked if he could finish the work in his department and Mr. Barnette agreed. Mr. Barnette believed that it would take the claimant less time than it actually took the claimant to complete his work. Mr. Barnette kept returning and telling the

claimant to go to the toy department, and the claimant indicated that he was just finishing up. Mr. Barnette conceded that when he came back to check on the claimant that the claimant seemed busy, and the claimant testified that he was busy. In any event, after about three and a half hours, at 9:30 p.m., Mr. Barnette told the claimant specifically to go to the toy department and the claimant did so.

The claimant wrote a note to his department manager, Mary Swanson, hardware department manager. The contents of the note are at issue. The claimant testified that he wrote in the note that due to ignoring everyone in the surrounding area he got everything done that he was supposed to. The claimant denies mentioning specifically Mr. Barnette. Mr. Barnette and Mr. Purcell testified that the note apologized for not getting his work done because he was too busy ignoring Mr. Barnette, and both testified that the note actually referred to Mr. Barnette. The administrative law judge concludes that in some fashion the note did refer to Mr. Barnette and indicated that the claimant was ignoring him.

The administrative law judge is constrained to conclude on the record here that there is not a preponderance of the evidence that the claimant's behaviors were willful or deliberate and therefore there is not a preponderance of the evidence of any deliberate acts on the part of the claimant constituting a material breach of his duties and obligations arising out of his worker's contract of employment or that evince a willful or wanton disregard of the employer's interests and are therefore not disqualifying misconduct for those reasons. The administrative law judge in no way condones the disregard or the failure to follow instructions of superiors. What convinces the administrative law judge here that the claimant did not deliberately violate the instructions of the employer is that he requested from Mr. Barnette that he be allowed to finish his work in the hardware department and Mr. Barnette agreed. The claimant testified that he was thereafter busy, and Mr. Barnette even testified that the claimant did seem busy. It is true that Mr. Barnette repeatedly kept asking the claimant to go to the toy department, but the claimant was still working in the hardware department. The note that the claimant left for his manager at first glance seems to indicate that the claimant's actions in avoiding going to the toy department were willful or deliberate. The claimant indicated that he was ignoring Mr. Barnette. However, when confronted about this the claimant testified that he had used the wrong word. The claimant also testified that he had not deliberately referred to Mr. Barnette but rather to others in his surrounding area, including co-workers who might otherwise have distracted him from his work. This is a close question, but the administrative law judge must conclude that the claimant's behaviors here were not willful or deliberate. The administrative law judge does conclude that the claimant's behaviors were negligent. It is clear that Mr. Barnette wanted the claimant to go to the toy department and the claimant did not. When the claimant wrote the note to Ms. Swanson he was negligent in writing the note in such a way as to appear to be ignoring Mr. Barnette. The issue then becomes whether the claimant's carelessness or negligence was in such a degree of recurrence as to establish disqualifying misconduct.

On the record here, although again it is a close question, the administrative law judge concludes the claimant's acts were not carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. As noted above, the administrative law judge concludes that the claimant's acts on December 12 were carelessness or negligence. However, there is no evidence of any relevant warnings or disciplines. The claimant had a decision-making day in March of 2005 for misusing breaks or meal periods but not for disobeying instructions or difficulties with managers. In fact, the claimant received no warnings or disciplines for such behavior. Therefore, on the record here, the administrative law judge is constrained to conclude that the claimant's negligence or carelessness was not recurring negligence sufficient to establish disqualifying misconduct but was rather ordinary negligence in

an isolated instance and is not disqualifying misconduct. If the claimant had received any relevant warnings for disobeying instructions or there was a clear refusal to comply with the instructions of Mr. Barnette, the administrative law judge might reach a different result. However there is insufficient evidence of that here.

In summary, and for all of the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided he is otherwise eligible.

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 $1,088.00 since separating from the employer herein on or about December 13, 2005, and filing for such benefits effective December 18, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of January 12, 2006, reference 01, is affirmed. The claimant, Gary H. Schultz, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

kkf/kjw