

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TERRY A DANIELSEN
Claimant

APPEAL NO. 09A-UI-15919-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 09/06/09
Claimant: Respondent (2)

Section 96.5-2-a – Discharge
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

Wal-Mart Stores Inc. filed a timely appeal from a representative's decision dated October 9, 2009, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on November 24, 2009. The claimant participated personally. The employer participated by Mary Chenoweth, Manager and Ken Upton, Service Manager.

ISSUES:

At issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment benefits and whether the claimant has been overpaid job insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Terry Danielsen was employed by Wal-Mart Stores from September 2, 2006 until August 22, 2009 when he was discharged from employment. Mr. Danielsen held the position of shopping cart attendant and was paid by the hour. His immediate supervisor was Mary Anderson. The claimant was discharged after he was personally observed by Ken Upton on or about August 22, 2009 taking an unauthorized break from work 15 minutes after clocking in. Mr. Upton observed Mr. Danielsen in an automobile belonging to Mr. Danielsen's friend. The claimant was eating and smoking for approximately a 15-minute period. Mr. Danielsen continued to wear his company vest while engaged in these non-work-related activities.

Under established company policies employees are expected to wait three hours after clocking in before taking breaks and are required to remove their company vest while on break so that their status could clearly be identified by other company employees. Mr. Danielsen was aware of the company policies and requirements through orientation and through the company handbook.

A decision was made to impose discharge instead of a lesser form of disciplinary action because Mr. Danielsen's services were needed to perform duties for the company at the time that he took his unauthorized break and because the claimant had received four previous warnings for failure to follow company policies or procedures.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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 evidence in the record establishes that Mr. Danielsen was aware of the company policy that required company employees to wait a minimum of three hours before taking an authorized break. The claimant was also aware of the policy that required employees on breaks to remove their company vest to clearly identify their status to other workers. Although aware of these policies, Mr. Danielsen took an unauthorized break on or about August 22, 2009, 15 minutes after reporting for work. The claimant discontinued performing services for the company and spent approximately 15 minutes in a friend's automobile eating and smoking in the company parking lot. The claimant's services were needed at the time. The claimant's supervisor was unaware of the claimant's activities and the claimant was unauthorized to take a break at that time. Because the claimant had received four previous warnings, a decision was made to terminate the claimant.

Based upon the evidence in the record the administrative law judge concludes that the claimant's conduct showed a willful disregard for the employer's interests and standards of behavior that the employer had a right to expect of its employees under the provisions of the Iowa Employment Security Act. Benefits are withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

DECISION:

The representative's decision dated October 9, 2009, reference 01, is reversed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, providing that he is otherwise eligible. The issue of whether the claimant must repay the unemployment insurance benefits is remanded to UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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