

**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**

**Appeal Number: 04A-UI-07460-DWT
OC: 06/06/04 R: 03
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.**

**MICHELE R LERCH
625 – 18TH AVE
CEDAR RAPIDS IA 52404**

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 are based.

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

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
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc. (employer) appealed a representative's June 29, 2004 decision (reference 01) that concluded Michele R. Lerch (claimant) was qualified to receive unemployment insurance benefits, and the employer's account was subject to charge because the claimant had been discharged for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 25, 2004. The claimant responded to the hearing notice and provided a phone number in which to contact her for the hearing. The claimant was not available for the hearing. Prior to the hearing, the claimant contacted the Appeals Section and informed an employee she could not participate in the scheduled hearing. The administrative law judge was not informed that the claimant had called before the scheduled hearing. The claimant was instructed by the Appeals Section employee that she could fax in a statement, which she did. Again, the administrative law judge was not informed of this fact until 11:30 a.m. or after the hearing had

been closed. The employer was not made aware of any information contained in the claimant's faxed statement at that time of the hearing. Greg Cason, the store manager, and Mark Denny, a co-manager, testified on the employer's behalf. Houston Campbell and Peggy Wagner were available to testify 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 on August 26, 1992. She worked full time as the bakery manager. The employer's workplace violence policy informs employees the employer does not tolerate threats, intimidation, or any physical abuse of another employee. The claimant received a copy of the employer's policy in September 2001. As a supervisor the claimant's job responsibility included enforcing the employer's workplace violence policy.

On June 7, 2004, a bakery employee, T., reported that the claimant kicked other employees and threw a rag at T. When the employer talked to the other employees, A. and J., they told the employer how the claimant kicked them in their derriere when she was upset with them. The employees reported that even though the claimant had done this in late May they were fearful the claimant would retaliate against them if they told the employer.

The employer talked to the claimant about the allegations. She admitted she kicked A. and J. and that she had thrown a rag at T. The employer discharged the claimant for violating the employer's workplace violence and because she was a supervisor her conduct demonstrated lack of respect and total disregard for her co-workers.

The claimant established a claim for unemployment insurance benefits during the week of June 6, 2004. She filed claims for the weeks ending June 26 through July 31, 2004. She received a total of \$1,800.00 in benefits during these weeks.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges her for reasons constituting work-connected misconduct. Iowa Code §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).

Although the employer presented hearsay information, the claimant was not at the hearing to refute or explain the incidents the three employees reported to the employer. Based on the evidence presented during the hearing, the claimant knew and understood the employer's

workplace violence policy. The claimant violated the policy more than once when she kicked other employees and threw a rag at an employee. A preponderance of the evidence establishes the claimant committed work-connected misconduct. Therefore, as of June 6, 2004, the claimant is not qualified to receive unemployment insurance benefits.

If an individual receives benefits she 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 §96.3-7. The claimant is not legally entitled to receive unemployment insurance benefits for the weeks ending June 26 through July 31, 2004. She has been overpaid \$1,800.00 in benefits she received for these weeks.

DECISION:

The representative's June 29, 2004 decision (reference 01) is reversed. The employer discharged the claimant for reasons constituting work-connected misconduct. The claimant is disqualified from receiving unemployment insurance benefits as of June 6, 2004. This disqualification continues until she has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged. The claimant is not legally entitled to receive unemployment insurance benefits for the weeks ending June 26 through July 31, 2004. She has been overpaid and must repay the \$1,800.00 in benefits she received for these weeks.

dlw/kjf