

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

STEPHANIE M SLATTON
1405 – 133RD ST
PELLA IA 50219

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

Appeal Number: 05A-UI-11439-HT
OC: 11/14/04 R: 02
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
Section 96.3(7) – Overpaid

STATEMENT OF THE CASE:

The employer, Wal-Mart, filed an appeal from a decision dated October 26, 2005, reference 06. The decision allowed benefits to the claimant, Stephanie Slatton. After due notice was issued a hearing was held by telephone conference call on November 28, 2005. The claimant provided a telephone number of (641)861-1034. That number was dialed at 8:01 a.m. and the only response was a message machine. A message was left notifying the claimant the hearing would proceed without her participation unless she called the toll-free number prior to the close of the record. By the time the record was closed at 8:20 a.m. the claimant had not responded and did not participate. The employer participated by Assistant Manager Cynthia Simmers.

The record was closed at 8:20 a.m. At 11:35 a.m. the claimant called and requested to participate. She had received the notice of the hearing and responded with a phone number. She indicated she was not at the number at the time and date of the hearing because of "family problems" but did not specify why this prevented her from being at the number provided or requesting a postponement.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: Stephanie Slatton was employed by Wal-Mart from December 14, 2004 until October 6, 2005. She was a full-time deli associate.

On October 5, 2005, the claimant was scheduled to work 2:00 p.m. until 11:00 p.m. She punched out for her regular one-hour lunch break around 6:00 p.m. and remained in the store. However, she left the store without punching out between 8:40 p.m. and 9:30 p.m. Assistant Manager Cynthia Simmers had viewed the video tape from the surveillance camera and saw the claimant leave and get into a car with a man, and return 50 minutes later alone.

The next day Ms. Simmers talked to the claimant about the incident and at first Ms. Slatton denied it, but finally admitted to leaving without punching out when told she had been seen on the surveillance tape. Her only explanation was that she needed to talk with her boyfriend. She also admitted she knew it was against policy to leave without punching out.

The employer's policy considers this type of action to be "time theft" and discharge may occur for even one incident. Ms. Simmers discharged the claimant on October 6, 2005.

Stephanie Slatton has received unemployment benefits since filing an additional claim with an effective date of October 2, 2005.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes she 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.

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 claimant was aware of the employer's policy regarding "time theft" but did not offer any explanation except that she had to talk with her boyfriend. If it was an urgent matter she could have talked to her supervisor and gotten permission to leave. Even if she was not able to reach a supervisor, she could have punched out rather than be gone for an hour while on the clock and being paid wages she did not earn. This is conduct not in the best interests of the employer and the claimant is disqualified.

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 claimant has received unemployment benefits to which she is not entitled. These must be recovered in accordance with the provisions of Iowa law.

The next issue is whether the record should be reopened. The judge concludes it should not.

871 IAC 26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.

- a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.
- b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.
- c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

The claimant received the notice and responded as required. She did not follow the instructions on the notice of the hearing to be at that number on the time and date of the hearing, or to request a postponement prior to the hearing for any personal or family problems she might be experiencing. The record does not establish good cause to reopen the record and the request is denied.

DECISION:

The representative's decision of October 26, 2005, reference 06, is reversed. Stephanie Slatton is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount provided she is otherwise eligible. She is overpaid in the amount of \$425.00.

bgh/tjc