

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

JENNY L WHITEACRE  
602 N 11<sup>TH</sup>  
ESTHERVILLE IA 51334

WAL-MART STORES INC  
C/O THE FRICK COMPANY  
PO BOX 283  
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-03378-H2T  
OC: 08-14-05 R: 01  
Claimant: Respondent (5)

**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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge/Misconduct  
Section 96.6-2 - Timeliness of Appeal

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 1, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 12, 2006. The claimant did participate. The employer did participate through Art Cummings, Assistant Manager and Sandy Webber, Photo Center Manager. Employer's Exhibits One and Two were received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: A disqualification decision was mailed to the employer address of record on September 1, 2005.

The employer's representative did receive the decision and did file an appeal to the decision on September 12, 2005. For some unknown reason Iowa Workforce Development did not receive the appeal letter or did not docket it. The first notice the employer had that a decision had been rendered against it was the statement of charges. The employer appealed within 30 days of the receipt of the statement of charges. The employer has established that it filed a timely appeal.

The claimant was employed as a loader/unloader full-time beginning October 16, 2003 through August 10, 2005 when she was discharged. The claimant was discharged for allegedly committing insubordination. The claimant was told repeatedly that her most important and necessary function to complete was to get the truck unloaded by 6:00 p.m. If the truck were not unloaded in a timely manner, that is, by 6:00 p.m. then the claimant faced discipline from the manager who came on duty around 8:00 p.m. On the night of August 8, 2005 the claimant was told by another manager to stop unloading her truck at approximately ten minutes till 6:00 p.m. The claimant explained that the other manager had told her she had to get the truck unloaded by 6:00 p.m. or she would be in trouble with another member of the management team. The manager, Art Cummings, did not understand the claimant's dilemma and wrote her up for insubordination. The claimant was given a decision day after which in order to keep her job she was to write that she would always follow the managers' instructions and that she had failed to do so in the past. The claimant refused to indicate she had done anything wrong because by continuing to work she was following one of the manager's instructions. The claimant was placed in a position where she could not follow both managers' instructions. No matter what she did, one of the managers was going to discipline her.

#### REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the employer's appeal is timely. The administrative law judge determines it is.

Iowa Code Section 96.6-2 provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law

judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The employer did file a letter or notice of appeal that was not received or docketed by Iowa Workforce Development. The employer timely appealed the statement of charges which was their first notice that an adverse decision had been rendered against them. Therefore, the appeal shall be accepted as timely.

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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 employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer discharged the claimant and has the burden of proof to show misconduct. Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988).

The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. Endicott v. IDJS, 367 N.W.2d 300 (Iowa App. 1985). The claimant has clearly established that she found herself in the situation of being between the proverbial rock and a hard place. If she followed manager Art's instruction, she would be disciplined or yelled at for failing to get the truck unloaded by 6:00 p.m. according to the night manager's instructions. Under such circumstances, the administrative law judge cannot conclude the claimant committed misconduct. Even when the claimant explained the situation to upper management, they still did not provide her with instructions or directions on how to choose between competing instructions from managers. No misconduct has been established. Benefits are allowed, provided the claimant is otherwise eligible.

#### DECISION:

The September 1, 2005, reference 01, decision is affirmed. The employer's appeal is timely. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

tkh/pjs