

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

BRANDI M BROWN
2345 SIVERS RD
GLENWOOD IA 51534

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

Appeal Number: 04A-UI-12019-RT
OC: 10-10-04 R: 01
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 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 October 28, 2004 reference 01, allowing unemployment insurance benefits to the claimant, Brandi M. Brown. After due notice was issued, a telephone hearing was held on December 15, 2004, with the claimant participating. Darlene Gillaspie, Assistant Manager of the employer's store in Council Bluffs, Iowa, participated in the hearing for the employer. Employer's Exhibits 1 and 2 were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development 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 Exhibits 1 and 2, the administrative law judge finds: The claimant was employed by the employer as a full-time department manager in the accessories department from June 16, 2000 until she was discharged on October 14, 2004. The claimant was discharged for theft arising out of an incident on September 29, 2004, when the claimant exchanged three garments for cash. On that day the claimant took an old adult "Faded Glory" shirt, which had been worn and washed approximately six or seven times, which shirt she had purchased approximately six months earlier from the employer and which shirt was no longer carried by the employer, and two old girls' shirts, which were not purchased from the employer and which had been worn and washed a number of times, and exchanged them for cash. On September 23, 2004, the claimant had bought clothing, including shirts from the employer. The shirts she purchased were not the shirts she returned. The claimant took the three old shirts and the sales slip for the purchases on September 23, 2004 and exchanged the old shirts for cash on September 29, 2004. The claimant had switched tags to the old shirts. The employer learned about this through a video tape and the service desk. The employer interviewed the claimant and she admitted to this behavior in writing, as shown at Employer's Exhibit 1.

The employer has policies in its handbook, a copy of which the claimant received and for which she signed an acknowledgment, as shown at Employer's Exhibit 2, prohibiting this practice. The employer treats this practice as theft. At the time of the incident the claimant was not thinking about her actions since she needed money, but in retrospect, knew that her behavior was wrong. There were no other reasons for the claimant's discharge. The claimant had not been accused of this before, nor had she received any warnings or disciplines. The value of cash received by the claimant for the exchange of the three old garments was \$21.29. Pursuant to her claim for unemployment insurance benefits filed effective October 10, 2004, the claimant has received unemployment insurance benefits in the amount of \$610.00 as follows: zero benefits for benefit week ending October 16, 2004 (earnings \$386.00); \$305.00 for two weeks, benefit weeks ending October 23 and 30, 2004; and zero benefits for benefit week ending November 6, 2004 (earnings \$460.00).

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.
2. Whether the claimant is overpaid unemployment insurance benefits. 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 parties agree, and the administrative law judge concludes, that the claimant was discharged on October 14, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witness, Darlene Gillaspie, Assistant Manager at the employer's store in Council Bluffs, Iowa, credibly testified that on September 29, 2004, the claimant exchanged three old garments, each of which had been worn and washed repeatedly, for cash as if they were returns of new garments. One shirt was an adult "Faded Glory" shirt, which had been washed and worn six or seven times and which had been purchased from the employer but six months earlier and the employer no longer carried that brand. The other two shirts were girls' shirts, which the claimant had not purchased from the employer and which brand the employer never carried. These two girls' shirts were also old and previously worn and washed. The claimant used a sales slip for new garments purchased on September 23, 2004 to achieve the exchange for cash. The claimant switched tags from the new garments she had purchased to the old garments. The claimant admitted to this behavior, both at the hearing and in writing, at Employer's Exhibit 1. The employer has policies prohibiting such behavior and the claimant received a copy of the policies and signed an acknowledgment, as shown at Employer's Exhibit 2. Although the claimant testified that at the time she was not thinking of the wrongfulness of her acts, in retrospect the claimant knew they were wrong. The administrative law judge must conclude that in fact, at the time, the claimant was aware that this behavior was wrong. The administrative law judge appreciates the candor of the claimant but is constrained to conclude that the claimant's exchange of old shirts for cash was a deliberate act constituting a material breach of her duties and obligations arising out of her worker's contract of employment and evinces a willful or wanton disregard of an employer's interest and is disqualifying misconduct. It is true that the claimant had never been accused of this behavior, nor had she ever received any warnings, but the administrative law judge must

conclude here that the claimant's acts were in the nature of a theft and is disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct, and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

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 \$610.00 since separating from the employer herein on or about October 14, 2004 and filing for such benefits effective October 10, 2004, to which she is not entitled and for which she is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions Iowa law.

DECISION:

The representative's decision dated October 28, 2004, reference 01, is reversed. The claimant, Brandi M. Brown, is not entitled to receive unemployment insurance benefits until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct. She has been overpaid unemployment insurance benefits in the amount of \$610.00.

b/tjc