

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LISA A KETCHUM

Claimant

APPEAL NO: 11A-UI-13076-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 09/11/11

Claimant: Appellant (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Lisa A. Ketchum (claimant) appealed a representative's September 29, 2011 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Wal-Mart Stores, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 25, 2011. The claimant participated in the hearing. Jarod Gustafson appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on May 31, 2008. She worked part time (25 – 32 hours per week) as a cashier at the employer's Mason City, Iowa store. Her last day of work was July 28, 2011. The employer suspended her on that date, and discharged her on September 8, 2011. The stated reason for the suspension and discharge was the claimant's arrest and subsequent conviction for shoplifting at another local store.

The employer has a policy of which the claimant was on notice which provides that if an employee is arrested for any offense at any time, the employee must notify the employer, at which time the employee will be suspended. The policy further provides that if that arrest results in a conviction, the employee will be discharged.

On or about July 27 the employer became aware that the claimant had previously been arrested and charged with fifth degree theft arising from a shoplifting incident at another local store. As a result the employer suspended the claimant on July 28. On September 7 the claimant was convicted of the charges. As a result, on September 8 the employer discharged the claimant.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

Under the definition of misconduct for purposes of unemployment benefit disqualification, the conduct in question must be "work connected." Diggs v. Employment Appeal Board, 478 N.W.2d 432 (Iowa App. 1991). However, the court has concluded that some off duty conduct can have the requisite element of work connection. Kleidosty v. Employment Appeal Board, 482 N.W.2d 416, 418 (Iowa 1992). Under similar definitions of misconduct, it has been found:

In order for an employer to show that is employee's off-duty activities rise to the level of misconduct in connection with the employment, the employer must show by a preponderance of the evidence:

[T]hat the employee's conduct (1) had some nexus with her work; (2) resulted in some harm to the employer's interest, and (3) was in fact conduct which was (a) violative of some code of behavior impliedly contracted between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer.

Dray v. Director, 930 S.W.2d 390 (Ark. App 1996); In re Kotrba, 418 N.W.2d 313 (SD 1988), quoting Nelson v. Department of Employment Security, 655 P.2d 242 (WA 1982); 76 Am. Jur. 2d, Unemployment Compensation §§77-78. Therefore, for example, use of a controlled substance on an employee's own time can be work-connected misconduct where the employer's policies prohibit such illegal off-duty conduct and the employee is on notice of such policies. Kleidosty, supra.

Here, there is a connection between the claimant's integrity as a customer in another retail store and her integrity as a clerk in the employer's retail store. There is a definite risk of harm to the employer's interest in having an employee who has been shown to be capable of theft of a store's property. There was an established and known code or policy which the claimant violated. The claimant's theft conviction shows a willful or wanton disregard of the standard of

behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

DECISION:

The representative's September 29, 2011 decision (reference 01) is affirmed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of September 8, 2011. This disqualification continues until the claimant 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.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs