

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KATHLEEN G MCCONNELL
Claimant

APPEAL NO. 16A-UI-13442-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 11/20/16
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Wal-Mart Stores (employer) appealed a representative's December 8, 2016, decision (reference 01) that concluded Kathleen McConnell (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for January 10, 2017. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer participated by Tyler Ball, Co-manager, and Brad Sunderland, Asset Protection Manager. The employer offered and Exhibit 1 was received into evidence. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on November 6, 2002, as a full-time photo lab associate. The claimant had discussions about some policies at her orientation on January 15, 2005. Attendance was not checked as being discussed on the Orientation Checklist. The Rest Breaks, Meal Period and Days of Rest Policy was not included in the items the claimant acknowledged receipt for on January 15, 2005. That policy was updated on June 2, 2012. It does not indicate the punishment for a rest period violation. It states that employees who work over six hours in a single workday will receive two paid, uninterrupted fifteen-minute rest breaks. It is unknown whether the claimant received that policy. The employer did not issue the claimant any warnings during her employment that were in effect at the end of her employment.

At some point the employer was informed the claimant was taking long breaks. The employer investigated and found the claimant was taking long breaks over a thirteen week period. The last day she took a long break was on October 25, 2016. She took one twenty-five minute break and another twenty-six minute break on that day. The employer discovered the October 25, 2016, break on October 25, 2016. On that day the employer knew of the previous

long breaks. The claimant continued to work for fifteen more days. On November 8, 2016, the employer terminated the claimant for taking long breaks.

The claimant filed for unemployment insurance benefits with an effective date of November 20, 2016. The employer participated personally at the fact finding interview on December 7, 2016, by Rex Toney.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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 must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident provided by the employer occurred on October 25, 2016. The claimant was not discharged until November 8, 2016. The employer has failed to provide any evidence of willful and deliberate misconduct which was the final incident leading to the discharge and disqualification may not be imposed.

DECISION:

The representative's December 8, 2016, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs