

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHARON M FITCH

Claimant

APPEAL NO. 09A-UI-16717-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 10/04/09

Claimant: Respondent (2R)

Section 96.5-2-A – Misconduct

Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated October 23, 2009, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on December 11, 2009. Claimant participated. Employer participated by Thomas Baumgartner, Asset Protection Coordinator; Shawna Kraber, Assistant Manager; Kari Gates, Assistant Manager; and David Chappell, Shift Manager. The employer was represented by Alison Dempsey, Attorney at Law. The record consists of the testimony of the following individuals: Thomas Baumgartner; Shawna Kraber; Kari Gates; David Chappell; and Sharon Fitch and Employer's Exhibits 1-14.

ISSUES:

Whether the claimant was discharged for misconduct; and

Whether the claimant has been overpaid benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness and having considered all of the evidence in the record, makes the following findings of fact:

The employer in this case is a retail operation and the store where the claimant worked is located in Ottumwa, Iowa. The claimant was hired on November 6, 2008, as a full-time cashier. She was terminated on October 1, 2009, for theft of store property.

The event that led to the claimant's termination occurred on September 19, 2009. An assistant manager, Kari Gates, had come back into the store and observed the claimant eating a bag of Cheetos while on the floor. The claimant was working at the self check at that time. Ms. Gates was concerned about what she saw and reported the matter to Thomas Baumgartner, the asset protection coordinator at the store. Mr. Baumgartner reviewed surveillance video of the claimant for the prior thirty days while she was working and examined store records that would show when products were purchased. In addition, the claimant's associate's card was reviewed

to see if there were food purchases on that card. The surveillance video showed the claimant taking candy items and pop. The employer's records do not show that these items were paid for.

On September 30, 2009, the claimant was interviewed by Mr. Baumgartner with witnesses present. She then prepared a statement in her own handwriting. In her statement, the claimant said that if her blood sugar dropped while she was working, she would grab a bottle of pop or bag of chips. She also wrote that the amount of food taken was \$15.00. (Exhibit 1) She signed a restitution note for \$15.00. (Exhibit 2) David Chappell, the shift manager, made the decision to terminate the claimant.

REASONING AND CONCLUSIONS OF LAW:

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. In this case, the alleged misconduct is theft of company property. An employer can reasonably expect that its employees will not take company property without properly paying for it. Theft of company property was prohibited in the employer's handbook and termination could result if theft occurred.

The administrative law judge has carefully considered all of the evidence in this case and is mindful that the claimant testified that she did not take any food without paying for it. She acknowledged that if she was working she might take some food, such as pop, candy and chips. She said that she would give the money to other persons and that she could not have her family's checkbook at work. The claimant's testimony is at odds with what she put in her statement and what she told Mr. Baumgartner when she was interviewed. It is also not consistent with signing a restitution note. The claimant testified that the atmosphere at the interview was intimidating, but it appears that some care was taken by the employer to prevent that. The greater weight of the evidence is that the claimant did take some food items without paying for them. Accordingly, misconduct has been shown. Benefits are denied.

The next issue is overpayment of benefits. Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

This matter is remanded to the Claims Section for determination of any overpayment.

DECISION:

The decision of the representative dated October 23, 2009, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css