

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

RICK R HACKETT
1287 – 100TH ST
CORYDON IA 50060-8854

WAL-MART STORES INC
C/O TALX UC EXPRESS
P O BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 060-UI-05072-RT
OC: 01/08/06 R: 03
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 February 21, 2006, reference 02, allowing unemployment insurance benefits to the claimant, Rick R. Hackett. After due notice was issued, a telephone hearing was held on May 30, 2006, with the claimant participating. Kandi Hackett, the claimant's wife, testified for the claimant. Susan Appler, Assistant Manager of the employer's store in Indianola, Iowa, where the claimant was employed, participated in the hearing for the employer. Barb Shuminski, Personnel Manager, was available to testify for the employer but not called because her testimony would have been repetitive and unnecessary. Employer's Exhibits One

through Four were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

An initial hearing in this matter was held on March 27, 2006 without the claimant's participation. The administrative law judge who conducted that hearing issued a decision dated March 31, 2006, reversing the representative's decision and denying benefits to the claimant. The claimant appealed this decision to the Employment Appeal Board. By decision dated May 9, 2006, the Employment Appeal Board remanded this matter for another hearing with the claimant's participation. At 1:44 p.m. on May 26, 2006, the administrative law judge spoke to the claimant's wife. She asked if the claimant could participate by cell phone. The administrative law judge answered in the affirmative, yes, if the cell phone reception was good. The claimant's wife also asked if she could participate in the hearing and the administrative law judge again answered in the affirmative, yes. The claimant and his wife participated in the hearing.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One through Four, the administrative law judge finds: The claimant was employed by the employer as a full-time overnight maintenance associate from March 5, 2005, until he was discharged on October 11, 2005. The claimant was discharged for theft, namely, taking deposit cans already redeemed by customers and redeeming them a second time and then keeping the cash personally. The employer provided redemption machines for customers to use to redeem their own deposit cans or bottles. When these machines were full, the customers would take the cans and bottles to a service desk and get redemption there. The claimant would then take those cans or bottles and run them through the machines later and take the receipts from the machines and obtain cash which he would keep for himself. These cans and bottles had already been redeemed once by the customer and then a second time by the claimant. The claimant was observed doing so on video tape by the employer's market asset protection manager, Brandon Stucki, as shown by his statement at Employer's Exhibit Three. Mr. Stucki confronted the claimant and the claimant signed a written statement as shown at Employer's Exhibit One. The claimant's written statement speaks for itself. The employer has rules covering integrity and in particular an associate's admission to theft as shown at Employer's Exhibit Two. The claimant signed an exit interview as shown at Employer's Exhibit Four. Pursuant to his claim for unemployment insurance benefits filed effective January 8, 2006, the claimant has received unemployment insurance benefits in the amount of \$1,972.00 for nine weeks from the benefit week ending January 14, 2006 to the benefit week ending March 11, 2006. This amount is now shown as overpaid as a result of the decision by the administrative law judge in a prior appeals' hearing which decision was not vacated but remanded for another hearing.

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. He 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 11, 2005. 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, Susan Appler, Assistant Manager at the employer's store in Indianola, Iowa, where the claimant was employed, credibly testified that the claimant took deposit cans and bottles already redeemed by the employer for customers and ran both deposit cans and bottles back through the employer's redemption machines taking the receipt and cashing it and keeping the money for himself. The testimony of Ms. Appler was only hearsay from what she was told or from what was written by Brandon Stucki, the employer's market asset protection manager. The administrative law judge concludes that although this testimony was hearsay, it is the kind of evidence on which a reasonably prudent person would be accustomed to rely on the conduct of their serious affairs and is therefore admitted and the administrative law judge further finds it is credible. The witness statement of Mr. Stucki appears at Employer's Exhibit Three. Mr. Stucki interviewed

the claimant and obtained a written statement by the claimant at Employer's Exhibit One. The written statement of the claimant speaks for itself. At the hearing the claimant denied taking any such cans or bottles and redeeming them himself and keeping the money personally. Rather, the claimant testified that all receipts from the redemption machines was deposited in the canister for a children's fund and that further the other redemptions made by the claimant for cash were also placed in a children's fund. The claimant testified at the hearing that he did redeem his own cans or bottles, the money for which he kept and used for lunch but those were his own cans. The claimant's testimony now is not credible. It is at odds with the clear statements at Employer's Exhibit One. During the hearing the claimant first conceded that he had written the statement and signed the statement at Employer's Exhibit One. Later the claimant testified that he did not remember the statement. Even later the claimant seemed again to concede that he had written the statement. The administrative law judge concludes that the claimant did in fact write that statement and it is an admission that the claimant took up to about \$50.00 of money from deposit cans or bottles which he redeemed for cash and kept the cash and he was not entitled to the cash. The administrative law judge further concludes that these actions violate the employer's policies including integrity and in regards to associate's admission to theft as shown at Employer's Exhibit Two. The administrative law judge finally concludes that these actions were deliberate acts or omissions constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evince a willful or wanton disregard of the employer's interests and are disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant left his employment voluntarily without good cause attributable to the employer and, as a consequence, he is disqualified to receive unemployment insurance benefits. It is true that there was evidence that criminal charges were filed and then dismissed but this does not necessarily indicate that the claimant did not commit the offenses or violations alleged. The administrative law judge concludes here that based on the claimant's written statement he did in fact commit the offenses or violations charged by the employer. Unemployment insurance benefits are denied to the claimant until, or unless, he 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 \$1,972.00 since separating from the employer herein on or about October 11, 2005 and filing for such benefits effective January 8, 2006. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with provisions of Iowa law.

DECISION:

The representative's decision of February 21, 2006, reference 02, is reversed. The claimant, Rick R. Hackett, is not entitled to receive unemployment insurance benefits, until, or unless, he requalifies for such benefits, because he was discharged for disqualifying misconduct. He has been overpaid unemployment insurance benefits in the amount of \$1,972.00.

cs/pjs