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

MARIAN L QUANDT
3423 BELLINGTON
WATERLOO IA 50701

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

LINDA A HALL
ATTORNEY AT LAW
PO BOX 2615
WATERLOO IA 50704-2615

Appeal Number: 05A-UI-06443-RT
OC: 05/22/05 R: 03
Claimant: Respondent (1)

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 June 7, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Marian L. Quandt. After due notice was issued, a telephone hearing was held on July 7, 2005, with the claimant participating. The claimant was represented by Linda Hall, attorney at law. Liz Graeser, Co-Manager, and Elizabeth Fouts, Assistant Manager, participated in the hearing for the employer. The employer was represented by Michael Sloan, of Johnson & Associates, now TALX UC eXpress. Claimant's Exhibits A, B, and C and Employer's Exhibit One were admitted into evidence. The administrative law judge takes official

notice of Iowa Workforce Development Department 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 Claimant's Exhibits A, B, C and Employer's Exhibit One, the administrative law judge finds: The claimant was employed by the employer as a full-time people greeter from January 25, 2001, until she was discharged on May 21, 2005. The claimant was discharged for an alleged integrity issue, including theft of time. The employer alleged that on May 15, 2005, the claimant came into the employer's store in Waterloo, Iowa, where the claimant was employed, and clocked in and then took one hour to get to the area where she was to work. The claimant, however, did not take that long to get to her area. Also on that day, the employer alleged that the claimant was entitled to take a 15-minute break but took a 42-minute break when she left at 2:06 p.m. and returned at 2:48 p.m. The claimant concedes that she may have been away from her workstation that long, but part of her duties are to wait on customers, and on that day she was waiting on customers and assisting customers. The claimant is not required to punch out for breaks, but is for meal times. The claimant has an anxiety disorder and diabetes, which cause diarrhea. This is an ongoing problem and is documented by doctor's statements at Claimant's Exhibit C, including recommendations that the claimant be on a strict diet and that she work no more than eight hours in a day. The employer was aware of the claimant's diabetic condition and the diarrhea problem. The claimant was given a Coaching for Improvement on May 16, 2004, as shown at Claimant's Exhibit A, for leaving her cash register with customers standing in line to go to the restroom. At that time the claimant commented about her diabetic condition and her diarrhea problem. Previously, the claimant had received verbal warnings without any dates from a number of different individuals about wasting time or ignoring customers but received no written warnings other than the Coaching for Improvement form dated May 16, 2004, as shown at Claimant's Exhibit A.

Employees do not have to punch in and out for breaks but do for the lunch period. The claimant did, on occasion, forget to punch out for a lunch break. The employer has a policy, as shown at Claimant's Exhibit B, that directs its associates to make customers feel like they are the most important part of the employer's business by meeting their needs and exceeding their expectations. Sometimes the claimant would be assisting customers and she would be away from her assigned work area while doing so. The employer has policies, as shown at Employer's Exhibit One, prohibiting unauthorized use of company time, such as a loafing.

Pursuant to her claim for unemployment insurance benefits filed effective May 22, 2005, the claimant has received unemployment insurance benefits in the amount of $1,472.00 as follows: $232.00 for benefit week ending June 11, 2005, (vacation pay $78.00), and $310.00 per week for four weeks from benefit week ending June 18, 2005, to benefit week ending July 9, 2005. For benefit weeks ending May 28, 2005, and June 4, 2005, the claimant reported vacation pay in an amount sufficient to nullify benefits.

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 not.

2. Whether the claimant is overpaid unemployment insurance benefits. She is not.

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 May 21, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Although it is a close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witnesses testified that the claimant was discharged for integrity issues involving theft of time when she was away from her work area and wasting time and loafing. The employer's witnesses testified about a particular incident on May 15, 2005, when the employer alleges the claimant clocked in but then took one hour to get to her area and then later took a 42-minute break that should have been 15 minutes. However, neither of the employer's witnesses had direct personal knowledge of the claimant's activities. The claimant denied taking one hour to get to her work area when she clocked in at work and conceded that she was late in returning from her break, but that was because she was waiting

on customers. The claimant credibly testified that the employer stresses customer service, and this is confirmed by Claimant's Exhibit B. The claimant credibly testified that she was often away from her area helping customers. The claimant also credibly testified that she has a diabetic and anxiety condition, or disorder, that causes diarrhea, and this is confirmed by doctor's statements at Claimant's Exhibit C. The claimant also credibly testified that the employer was aware of her condition, and this is confirmed by Claimant's Exhibit A, which is the only written warning the claimant ever received that is relevant, when she left her register in May of 2004 to go to the restroom. That warning states that the claimant is diabetic and pills that she takes causes her to have diarrhea problems at short notice. It is true that the employer has a policy, as shown at Employer's Exhibit One, prohibiting unauthorized use of company time, including loafing, but the administrative law judge is constrained to conclude that the employer has not demonstrated by a preponderance of the evidence that the claimant violated that policy. This is a close question because the employer's witnesses testified that there were tapes of some of these incidents. However, the witnesses for the employer did not have personal knowledge of the events to which they testified. They testified that they confronted the claimant about her behavior, and she admitted the warning and admitted that she had forgotten to clock out for lunch and took long breaks. The claimant concedes that she occasionally forgot to clock out for lunch. These admissions, if they are admissions, amount to nothing more than admitting that, occasionally, the claimant was careless or negligent in clocking out for lunch. The claimant offered explanations, as noted above, for being away from her area on certain occasions because she was waiting on customers. The evidence also establishes that the claimant was away from her area on certain other occasions because of her diabetic and anxiety disorder that causes diarrhea. The administrative law judge also notes that the only written warning the claimant received occurred on May 16, 2004. Thereafter, there is no evidence of any written warnings. There was hearsay testimony from the employer's witnesses that the claimant received verbal warnings from other supervisors at the employer, but few dates were even provided by the employer's witnesses.

Based upon the record here, and for the reasons set out above, the administrative law judge is constrained to conclude, although it is a close question, that there is not a preponderance of the evidence of any deliberate acts or omissions on the part of the claimant constituting a material breach of her duties and obligations arising out of her worker's contract of employment or that evince a willful or wanton disregard of the employer's interests or that are carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. There is evidence of ordinary negligence in isolated instances or good faith errors in judgment or discretion, or perhaps mere inefficiency, unsatisfactory conduct, but these are not disqualifying misconduct. Accordingly, the administrative law judge concludes that the claimant was discharged, but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature, including the evidence therefore. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

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 $1,472.00 since separating from the employer herein on or about May 21, 2005, and filing for such benefits effective May 22, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of June 7, 2005, reference 01, is affirmed. The claimant, Marian L. Quandt, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged, but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out her separation from the employer herein.

kjw/kjw