

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HOLLY E MIDKIFF
Claimant

APPEAL NO. 07A-UI-07209-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

**OC: 06/24/07 R: 03
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc., filed an appeal from a representative's decision dated July 16, 2007, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on August 9, 2007. The claimant participated personally. The employer participated by Jason Dennis, store manager, and Ms. Jody Jensen, area loss prevention manager. Employer's Exhibits Two, Three, Four, Five, and Six were received into evidence. Claimant's Exhibit A was received into evidence.

ISSUE:

The issue in this matter is whether the claimant was discharged for a current act of misconduct in connection with her work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all the evidence in the record, finds: The claimant worked for this employer from June 1, 1998, until June 25, 2007, when she was discharged from employment. Ms. Midkiff held the position of full-time courtesy desk associate and was paid by the hour.

The claimant was discharged on June 25, 2007, based upon an incident that had occurred approximately six weeks before on May 11, 2007. On that date, the claimant was observed placing a woman's swimsuit in the front portion of the pants she was wearing. The claimant was confronted by the store manager, Mr. Dennis, and the claimant explained at that time that she had placed the swimsuit in her pants because her arms were full carrying other items for purchase. Mr. Dennis instructed the claimant to proceed to the checkout area and to pay for the swimsuit as well as the other items. The claimant followed the manager's instructions.

Although Mr. Dennis suspected that the claimant was in the act of attempting to misappropriate the swimsuit, the claimant was nonetheless allowed to continue in employment and the matter was reported that day to the company's loss prevention area manager for investigation. Because the area loss prevention manager was not available for an extended period due to personal issues, the matter was referred to a second a loss prevention worker; however, the

matter was not investigated until June 25, 2007. At that time, the loss prevention area manager interviewed Ms. Midkiff. Based upon the circumstances and location of the swimsuit when the claimant was confronted on May 11 and admissions made by Ms. Midkiff during the investigation, the decision was made to terminate Ms. Midkiff from employment.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes, based upon the evidence in the record, that although the employer may have had just cause to discharge Ms. Midkiff on or about May 11, 2007, the company did not do so. The evidence establishes that although the employer had suspicions that the claimant was in the act of misappropriating company property, the claimant was allowed to continue to work as an employee for a very extended period of time before being discharged from employment. Approximately six weeks after the incident in question, the employer investigated the matter and that time made a management decision to terminate Ms. Midkiff for her prior conduct.

While it is understandable that there may have been some short delay in immediately investigating the incident, the delay of six or more weeks was excessive. The administrative law judge must therefore conclude that no current act of disqualifying misconduct has been shown at the time of the claimant's separation approximately six weeks later on June 25, 2007.

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.

871 IAC 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.

DECISION:

The representative's decision dated July 16, 2007, reference 01, is hereby affirmed. The claimant was not discharged for a current act of misconduct. Benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw