

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CYNTHIA A WEST

Claimant

APPEAL NO: 11A-UI-01585-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 01/02/11

Claimant: Respondent (2/R)

Section 96.5-2-a – Discharge

Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc. (employer) appealed a representative's January 28, 2011 decision (reference 01) that concluded Cynthia A. West (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 8, 2011. The claimant participated in the hearing. Lyndsey Hansen appeared on the employer's behalf and presented testimony from one other witness, Laura Bagwell. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on February 15, 2005. She worked full time as an invoice clerk and UPC clerk at the employer's Atlantic, Iowa store, working a Monday through Friday schedule. Her last day of work was January 5, 2011. The employer discharged her on that date. The stated reason for the discharge was falsifying time punches.

Ms. Hansen, then an assistant manager, began transitioning into the position of operations manager in about mid-November 2010. One of the duties she began to perform included screening of employees' time punch adjustments, a duty on which she focused perhaps more than her predecessor. She observed that the claimant had an unusually high number of time punch adjustments, and requested further investigation from the employer's asset protection division. Ms. Bagwell, an asset protection coordinator, investigated the claimant's time punch adjustments for the period of November 1 through December 31, 2010, which encompassed no more than 45 workdays. For that period she discovered there were 30 days in which the claimant had made one or more time punch adjustments.

On 28 of the 30 days the claimant had adjusted her morning clock in punch to reflect an earlier time than the initial clock in. Ms. Bagwell examined video surveillance and was able to ascertain that on at least 22 of the 28 days the claimant's initial morning clock in was only a few minutes after she parked her vehicle in the parking lot. There were three days in which the claimant modified her end of day clock out to a later clock out; those adjustments were made the morning after. There was one day in which the claimant moved back her initial punch out for her meal break, and nine days in which she modified her time back from her meal break. The employer calculated that the various adjustments to the claimant's time report for the two month period resulted in an additional 22 hours of paid time.

The final incident occurred on December 31. The claimant parked in the parking lot a few minutes before 6:49 a.m., went into the store and clocked in at 6:49 a.m., then subsequently modified her time punch to be 6:04 a.m. When questioned about these events on January 3, 2011, the claimant indicated that she had modified her time punches to reflect time she had been called upon to do work while she was "off the clock," such as going to the post office after hours, or being stopped to speak with vendors or members of management while off the clock. However, she indicated that on those occasions where she might be doing an errand after leaving work it would only have been for a few minutes each time. She indicated that some of the morning clock in changes were due to being stopped by can redemption personnel on her way into work; however, on the 22 instances where there was video surveillance to review for a morning clock in time adjustment, there was no sign of the can redemption personnel stopping the claimant.

The claimant established a claim for unemployment insurance benefits effective January 2, 2011. The claimant has received unemployment insurance benefits after the separation.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The claimant asserted that she had no reason to believe what she was doing was unacceptable. Simply because the issue had not been discovered previously does not mean that the claimant's actions were approved. This was not a situation where the claimant modified her time record once or twice for a relatively small amount of time; given that the claimant was making modifications virtually two out of every three days during the two-month period, amounting to 22 hours, a reasonable person would have known that without explicit approval from the employer or some clear documentation on her part as to the various reasons for such modifications, her actions were contrary to the employer's expectations and interests. The claimant's extreme violation of the employer's trust shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded the Claims Section.

DECISION:

The representative's January 28, 2011 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of January 2, 2011. This disqualification continues until the claimant has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs