

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ASHLEY THOMAS
Claimant

APPEAL NO: 06A-UI-08623-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

**OC: 07/30/06 R: 04
Claimant: Respondent (2)**

Section 96 5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc. (employer) appealed an unemployment insurance decision dated August 18, 2006, reference 01, which held that Ashley Thomas (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was on September 13, 2006. The claimant did not comply with the hearing notice instructions and did not call in to provide a telephone number at which she could be contacted, and therefore, did not participate. The employer participated through Andrew Smolenski, Assistant Manager. 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:

The issue is whether the employer discharged the claimant for work-connected misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a part-time greeter/cashier from November 15, 2005 through July 13, 2006 when she was discharged according to the employer's progressive disciplinary policy. She received her verbal warning on February 11, 2006 for failing to properly fill out a WIC check. The customer uses the check to purchase items but the employer cannot be reimbursed by the government unless the check is filled out properly. The claimant received a written warning on March 1, 2006 for having a total of 12 pink slips, which are either cash shortages or overages. The employer had received numerous complaints about the claimant's rude treatment of customers. On March 2, 2006, an assistant manager spoke to the claimant about the need to improve her customer services skills. Shortly after that warning, a customer complained that the claimant was being rude to her in the way she was talking to the customer.

The claimant was given a decision making day or a one day paid suspension. She was told to think about whether she wanted to continue working with Wal-Mart Stores and if so, she had to come up with a plan to improve the problem. The claimant wanted to continue her employment and her plan for improvement included "working on my work ethics, being more friendly, learning how to keep my mouth closed, and showing them I can be friendly and nice." She was advised the next step in the progressive disciplinary policy was termination.

On approximately July 11, 2006, the employer received another complaint from a customer about the claimant's conduct. The customer said it was not the first incident with the claimant but since it was continuing, she decided to contact management. The woman was dating the claimant's ex-boyfriend and the claimant harassed her each time she entered the store. The claimant told this woman to stay away from her ex-boyfriend, amongst other comments. When the claimant returned to work on July 13, 2006, the employer questioned her and she admitted harassing this customer. Consequently, she was discharged.

The claimant filed a claim for unemployment insurance benefits effective July 30, 2006 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. 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 section 96.5-2-a.

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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged per the employer's progressive disciplinary policy. She knew her job was in jeopardy and knowingly harassed a customer for personal reasons. The claimant's conduct was a willful and material breach of the duties and obligations to the employer and a substantial disregard of the standards of behavior the employer had the right to expect of the claimant. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The unemployment insurance decision dated August 18, 2006, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant is overpaid benefits in the amount of \$264.00.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs