

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

AMBER K WHIPP
402 4TH ST
PO BOX 51
HARVEY IA 50119

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

Appeal Number: 04A-UI-12022-RT
OC: 10/10/04 R: 02
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 October 29, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Amber K. Whipp. After due notice was issued, a telephone hearing was held on December 3, 2004, with the claimant participating. Michael Kabbes, Overnight Assistant Manager, participated in the hearing for the employer. Employer's Exhibits One and Two 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 Employer's Exhibits One and Two, the administrative law judge finds: The claimant was employed by the employer as a full-time overnight stocker from February 21, 2004 until she was discharged on October 11, 2004. The claimant was discharged for receiving four coaching for improvement warnings. The employer's policies provide that once an employee has accumulated four coaching for improvements that that employee is discharged. The fourth incident for which the claimant would have received a coaching for improvement form occurred on October 10, 2004. The claimant was assigned a job to "zone" an aisle. The claimant did not finish this job before she clocked out and went home. The claimant did not complete this assignment because she was too busy talking to another associate. The claimant and another associate were working together zoning aisles. The Overnight Assistant Manager, Michael Kabbes, the employer's witness, observed the two talking to each other. He told them what he wanted them to do, to zone the aisles, and left. Approximately 20 minutes later, he returned and observed the two still talking in the same spot and they had not started working. Mr. Kabbes told them both to get the job finished. He did this at 5:30 p.m. The job should have taken no more than one hour to complete. However, the claimant's assignment to zone the aisle was not completed at 7:00 p.m., but she nevertheless clocked out and went home. The zoning of the aisle was not completed. The next night, the claimant was discharged. The claimant could not stay late because she had a ride home. The claimant was talking to the coworker and this took time away from her work and that was part of the reason that she did not finish the work.

The claimant had received prior coaching for improvement forms as shown at Employer's Exhibit One. The claimant stated that the three coaching for improvement forms were accurate in terms of the reason for the coaching for improvement and the claimant conceded that she did the things stated therein. The first coaching for improvement was dated July 27, 2004. That was given to the claimant because she gets side tracked from her jobs very easily and it not only hurts her time, but then she walks around and talks to everyone else and brings the times of the others down. The claimant is expected to come in and do her job and not just visit with people. The second coaching for improvement was dated August 6, 2004 because the claimant was still struggling to come up with even a minimum acceptable level of employer's standards of production. The claimant was informed that it was imperative that all members be held to the same standard. The claimant was informed that she was expected to show that she takes seriously the occupation of taking care of the needs of the customer and show respect to her team members. The third coaching for improvement was dated September 9, 2004 because she talked to a coworker in an inappropriate manner yelling at her and saying that she was pissed off. She was informed that the employer expected her to speak with respect to other associates. All three of the coaching for improvements indicated that the next level of action could include termination.

Pursuant to her claim for unemployment insurance benefits filed effective October 10, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,265.00 as follows: \$161.00 for benefit week ending October 16, 2004 (earnings \$69.00) and \$184.00 per week for six weeks from benefit week ending October 23, 2004 to benefit week ending November 27, 2004.

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. She 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, 2004. 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, Michael Kabbes, Overnight Assistant Manager, credibly testified that the claimant was discharged because she had received three coaching for improvement forms and was going to receive a fourth, which would

call for a discharge. The employer has a policy that provides for a discharge upon four coaching for improvements. Although the employer's policy requires a discharge for four coaching for improvements, the administrative law judge must inquire as to the reason for the coaching for improvements in order to determine whether the claimant's behavior was disqualifying misconduct. Mr. Kabbes credibly testified that the fourth incident, which would have resulted in a fourth coaching for improvement, occurred on October 10, 2004 when the claimant was assigned a job to "zone" an aisle. He observed the claimant and a coworker talking and went up to them and told them what to do. Twenty minutes later, Mr. Kabbes credibly testified that he returned and the claimant and the coworker were in the same spot still talking and had not started their work. This was at 5:30 p.m. Mr. Kabbes further credibly testified that the job assigned to the claimant should have taken no more than an hour to do. However, at 7:00 p.m. the claimant had not completed the assigned task and clocked out and went home. The next day the claimant was discharged. At the hearing, the claimant admitted that she had not completed the task assigned and further admitted to talking to her coworker and finally admitted that talking to the coworker took time away from her work. Because of the claimant's admissions that she was talking instead of working and because of the three prior coaching for improvements, the administrative law judge concludes that the claimant's talking instead of working and completing her tasks was a deliberate act or omissions constituting a material breach of her duties and obligations arising out of her worker's contract of employment and evinces a willful or wanton disregard of the employer's interests and, at the very least, is carelessness or negligence in such a degree of recurrence all as to establish disqualifying misconduct.

The claimant had received three prior coaching for improvements as shown at Employer's Exhibit One. At the hearing, the claimant conceded that she had received the three coaching for improvements and that further they were accurate in terms of the behavior for which they were given and the claimant admitted that she had done the things included therein. At least two of them related to the need to concentrate on her work and not talk to coworkers and try to comply with employer's standards of production. The third relates to a relationship with a coworker. The three coaching for improvements and the final act which would have resulted in a fourth coaching for improvement all occur in less than three months. The claimant was on sufficient notice that she needed to concentrate on her work but failed to do so on October 10, 2004 even after being reminded by Mr. Kabbes. The administrative law judge is constrained to conclude that the claimant's behavior was disqualifying misconduct. What the claimant did here was far more than mere inefficiency or unsatisfactory conduct or failure in good performance as a result of inability or incapacity or ordinary negligence in an isolated instance. The claimant simply disobeyed instructions and talked to coworkers when she should have been working and could have been working. This is willful and deliberate. Accordingly, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she 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 \$1,265.00 since separating from the employer herein on or about October 11, 2004 and filing for such benefits effective October 10, 2004, to which she is not entitled and for which she is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions Iowa law.

DECISION:

The representative's decision dated October 29, 2004, reference 01, is reversed. The claimant, Amber K. Whipp, is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct. She has been overpaid unemployment insurance benefits in the amount of \$1,265.00.

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