

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SANDRA S GILLIAM

Claimant

APPEAL NO. 09A-UI-16177-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 09/20/09

Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct
730.5 – Drug Testing

STATEMENT OF THE CASE:

The claimant appealed a department representative's decision dated October 19, 2009, reference 01, that she was discharged for misconduct on September 18, 2009, and benefits are denied. A telephone hearing was held on December 3, 2009. The claimant participated. Matthew Spies, Store Manager, participated for the employer.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses, and having considered the evidence in the record, finds that: The claimant worked as a full-time associate in the electronics department from February 15, 2005 to September 18, 2009. Although the employer has a Drug & Alcohol policy, a written copy was not provided to the claimant at the time of hire or at any period during her employment.

When the claimant reported to work at 10:00 a.m. on the morning of September 18, co-workers reported to management they could smell alcohol on her breath. Claimant was directed to the store manager's office for evaluation. Manager Spies could smell alcohol on claimant's breath, her speech was slurred, and she was unsteady on her feet. Manager Spies suspected the claimant was under the influence of alcohol, and upon his request, claimant consented to testing at a local hospital with the escort of a female employee.

At the hospital, claimant submitted to breathe testing that showed she was under the influence of alcohol. Claimant consented to urine sample testing, but she was provided no written instructions other than being given a cup and sent into a bathroom. The claimant deposited a urine sample in the cup, flushed the toilet and handed the cup to the nurse on exiting the bathroom. The sample was rejected, because the claimant flushed the toilet. During the next several hours, the claimant submitted a second and third sample, but the nurse rejected the samples due to insufficient urine. Claimant returned to Wal-Mart where she was discharged for

refusing to provide the urine sample as requested in violation of the employer's alcohol testing policy. The claimant was not discharged for being under the influence of alcohol.

REASONING AND CONCLUSIONS OF LAW:

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.

The administrative law judge concludes that the employer failed to establish misconduct in the discharge of the claimant on September 18, 2009, because it failed to follow the drug testing requisites of Iowa Code section 730.5

The claimant did not refuse to submit a urine sample, and she should have been given the rehabilitation option of Iowa Code section 730.5(10)1. The failure of the testing authority to provide pre-testing procedure instructions to the claimant led to the rejection of an adequate, first urine sample, because the claimant did not know she should refrain from flushing the toilet after peeing in the cup. The claimant was not physically able to submit another adequate sample rather than refusing to do so.

DECISION:

The decision of the representative dated October 19, 2009, reference 01, is reversed. The claimant was not discharged for misconduct in connection with employment on September 18, 2009. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs