

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JACOB A GIBERSON
Claimant

APPEAL NO. 14A-UI-08634-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 07/20/14
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated August 11, 2014, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on September 9, 2014. The parties were properly notified about the hearing. The claimant failed to participate in the hearing. Brad Sunderland participated in the hearing on behalf of the employer. Exhibits One through Four were admitted into evidence at the hearing.

ISSUES:

Was the claimant discharged for work-connected misconduct?

Was the claimant overpaid unemployment insurance benefits?

Is the employer subject to charge for benefits paid?

FINDINGS OF FACT:

The claimant worked full time as an asset protection associate from May 9, 2006, to July 25, 2014. He was informed and understood that under the employer's work rules, he was not allowed to detain a suspected shoplifter unless he witnessed (1) the suspect selecting and taking an item of merchandise from a shelf, (2) the suspect concealing or removing a tag from the item, (3) the suspect continuously having possession of the item by maintaining visual contact with the suspect, and (4) the suspect passing the last point of sale. In the absence of all of these elements, he was not to detain a suspect or accuse a suspect of shoplifting. The policy also only allows the police to be called where a decision has been made to prosecute a shoplifter.

On July 16, 2014, the claimant detained a woman who he saw put a white object in her purse and called the police in violation of the employer's shoplifter policy. Specifically, the claimant did not witness the woman selecting and taking an item of merchandise from a shelf and he did not have continual visual contact with the woman up to the time when she went through the

checkout line. He stopped the woman as she was leaving the store and had her come back to the office. She denied taking anything. The claimant detained the woman in the office and called the police. The police officer searched the woman's purse but did not find any merchandise.

When the asset protection manager learned of the incident, he reviewed the surveillance video and observed that the woman appeared to have a white object in her hand when she entered the store and did not see her conceal any merchandise. The asset protection manager also interviewed the claimant and he admitted to the policy violations. As a result, the employer discharged the claimant on July 25, 2014.

The claimant filed for and received a total of \$1,939 in unemployment insurance benefits for the weeks between July 20, 2014, and September 6, 2014.

The asset protection manager at the appeal hearing was unaware of what happened at the fact-finding interview because the fact-finding interviews are handled by Equifax, the employer's third-party administrator for unemployment matters.

On September 2, 2014, the claimant provided his telephone number to participate in the hearing scheduled for September 9, 2014, at 10:30 a.m. His number was called twice and messages were left for him because he did not answer. He did not call while the hearing was in progress. He called at about 1:55 p.m. that day. He explained that he was not available because he believed the hearing was on September 3 based on a document he had received. He said he was waiting for a call that day. The claimant was given until noon on September 10 to submit the document he said had the hearing date of September 3, but no document was provided.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the claimant has good cause for reopening the hearing.

The Agency rules at Iowa Admin. Code r. 871-26.14(7) provide that if a party has not responded to a notice of telephone hearing by providing the appeals bureau with the names and telephone numbers of the persons who are participating in the hearing by the scheduled starting time of the hearing or is not available at the telephone number provided, the judge may decide the case based on the available information. The record may be reopened if the absent party makes a request to reopen the hearing and shows good cause for reopening the hearing. Iowa Admin. Code r. 871-26.14(7)c.

In this case, the claimant was not available for the hearing at the scheduled time of the hearing. He asserted that he believed the hearing was on September 3 based on a document he received, but did not produce the document when given the chance. It is also curious as to why, if the claimant believed his hearing was on September 3 and was waiting to be called on that date, that he would not have contacted the Appeals Bureau at that time to inquire about the case. Good cause to reopen the hearing has not been shown.

The next issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the

employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

The claimant's violation of a known policy 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. The claimant deliberately disregarded several elements of the employer's policy, jeopardizing customer relations with the customer he stopped. Work-connected misconduct as defined by the unemployment insurance law has been established in this case.

The unemployment insurance law generally requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. But a claimant is not required to repay an overpayment when an initial decision to award benefits on an employment-separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid \$1,939 in benefits. The employer's representative at the appeal hearing was unaware of what happened at the fact-finding interview because the fact-finding interviews are handled by Equifax. The only way to resolve the issue is by evaluating the information presented at the fact-finding interview, which was not sent to the parties. A remand is necessary to decide if the employer participated.

DECISION:

The unemployment insurance decision dated August 11, 2014, reference 01, is reversed. The claimant is disqualified from receiving unemployment insurance benefits until he has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant was overpaid 1,939 in benefits. The issue of whether the claimant is required to repay the overpayment and whether the employer will be charged for the overpaid benefits is remanded to the Agency.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/css