

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**RICK T LOWN**  
Claimant

**APPEAL NO. 07A-UI-07831-S2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**  
Employer

**OC: 07/15/07 R: 03**  
**Claimant: Appellant (1)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Rick Lown (claimant) appealed a representative's August 8, 2007 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with Wal-Mart Stores (employer) for violation of a known company rule. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 29, 2007. The claimant participated personally. The employer participated by Johna Hawker, Assistant Manager, and Charles Michalec, Assistant Manager.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on February 15, 1999, as a full-time receiving associate. The claimant signed for receipt of the company handbook on February 15, 1999. The handbook contained the employer's Drug and Alcohol policy. The claimant consumes alcohol almost every day for 25 years. He stopped drinking for a six-month period while undergoing treatment. He has not had a drivers' license for eight years because of a conviction for operating a motor vehicle while intoxicated.

On July 7, 2007, the claimant consumed a "pretty good" amount of alcohol. On July 5, 2007, the claimant consumed beer from 1:00 to 3:00 p.m. At 1:30 a.m. on July 6, 2007, the claimant began working after riding his bicycle to the employer's location. At approximately 6:15 a.m. the claimant was driving a forklift when he backed into a truck. He turned the forklift around and used it to try to pull out the truck's dented bumper. The employer noticed the smell of alcohol on the claimant's breath and took him to the hospital for an alcohol screen under the reasonable suspicion clause of the alcohol policy.

The claimant blew a .158 into a breathalyzer. The employer's policy calls for the termination of an employee who registers a .04 or above. The claimant also provided a urine sample for testing. The employer suspended the claimant pending the results of the urinalysis. On July 9,

2007, the results showed the claimant tested positive for alcohol consumption. The employer offered the claimant a "Last Chance Agreement" for the claimant to participate in treatment and keep his job. The claimant declined.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged for misconduct.

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.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Consumption of alcohol on the job following warning constitutes job misconduct where the claimant checked into an alcohol abuse program after the discharge and stopped drinking, showing that his actions were volitional. Ayersman v. Iowa Department of Job Service, 417 N.W.2d 466 (Iowa 1988). An employer has a right to expect employees to conduct themselves in a certain manner. The claimant disregarded the employer's right by being under the influence of alcohol while on the job. The claimant's conduct was volitional. His disregard of the employer's interests is misconduct. As such, he is not eligible to receive unemployment insurance benefits.

**DECISION:**

The representative's August 8, 2007 decision (reference 01) is affirmed. The claimant is not eligible to receive unemployment insurance benefits, because he was discharged from work for misconduct. Benefits are withheld until he has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

bas/kjw