

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DALE S DEARDORFF
Claimant

APPEAL 16A-UI-12579-CL-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 08/21/16
Claimant: Appellant (1)

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.5(2)b & c – Discharge/Gross Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 21, 2016, (reference 01) unemployment insurance decision that found claimant was discharged for gross misconduct. The parties were properly notified about the hearing. A telephone hearing was held on December 15, 2016. Claimant participated. Employer participated through personnel coordinator Bette Keeney and asset protection manager Jennifer Nestzer.

ISSUES:

Is the appeal timely?

Was the claimant discharged for reasons related to job gross misconduct sufficient to warrant a denial of unemployment benefits and deletion of wage credits prior to the separation?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The unemployment insurance decision was mailed to the appellant's address of record on September 21, 2016. The appellant did not receive the decision as he was homeless at that time. In November 2016, after obtaining a residence, claimant went into his local office and explained he had not received a copy of the decision. A copy was mailed to claimant at his new address. Claimant received the decision and filed his appeal a few days thereafter.

Claimant began working for employer on August 23, 2013. Claimant last worked as a customer service desk associate. Claimant was separated from employment on August 11, 2016, when he was terminated.

Over the course of four months, claimant stole \$2,157.03 from employer. On August 6, 2016, a supervisor witnessed claimant take a drink from a cooler. The supervisor asked asset protection manager Jennifer Nestzer to review surveillance footage to determine whether claimant paid for the drink. Nestzer discovered claimant had not paid for the drink and also took money out of the register he was working on. Nestzer then reviewed register transaction

records and surveillance footage back to April 5, 2016, and concluded claimant had stolen \$2,157.03 from the company.

On August 11, 2016, employer confronted claimant. Claimant wrote a written statement admitting he stole at least \$1,670 during his employment. Claimant was terminated the same day.

Employer reported claimant to the local authorities. He was charged with a crime to which he pled guilty.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is.

Iowa Code § 96.6(2) provides, in pertinent part:

The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. . . . Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision.

The appellant did not have an opportunity to appeal the fact-finder's decision because the decision was not received. Without notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). The claimant filed an appeal within a reasonable period of time after discovering the disqualification. Therefore, the appeal shall be accepted as timely.

For the reasons that follow, the administrative law judge further concludes the claimant was discharged from employment due to job-related gross misconduct.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Code § 96.5(2)b and c provide:

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:

b. Provided further, if gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers.

c. Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act. Determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith.

Under Iowa Code §96.5(2)(b) "if gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers." The cancellation of wage credits means that, even if the claimant earns ten times the benefit amount following the discharge from this employer, he may never collect benefits chargeable to the employer.

In Iowa, indictable offenses include serious misdemeanors, aggravated misdemeanors, and felonies, all of which are punishable by a fine of more than \$500.00 and more than 30 days in jail. Iowa Code § 801.4(8).

Iowa Code § 714.2 provides:

714.2 Degrees of theft.

1. The theft of property exceeding ten thousand dollars in value, or the theft of property from the person of another, or from a building which has been destroyed or left unoccupied because of physical disaster, riot, bombing, or the proximity of battle, or the theft of property which has been removed from a building because of a physical disaster, riot, bombing, or the proximity of battle, is theft in the first degree. Theft in the first degree is a class "C" felony.
2. The theft of property exceeding one thousand dollars but not exceeding ten thousand dollars in value or theft of a motor vehicle as defined in chapter 321 not exceeding ten thousand dollars in value, is theft in the second degree. Theft in the second degree is a class "D" felony. However, for purposes of this subsection, "motor vehicle" does not include a motorized bicycle as defined in section 321.1, subsection 40, paragraph "b".
3. The theft of property exceeding five hundred dollars but not exceeding one thousand dollars in value, or the theft of any property not exceeding five hundred dollars in value by one who has before been twice convicted of theft, is theft in the third degree. Theft in the third degree is an aggravated misdemeanor.
4. The theft of property exceeding two hundred dollars in value but not exceeding five hundred dollars in value is theft in the fourth degree. Theft in the fourth degree is a serious misdemeanor.
5. The theft of property not exceeding two hundred dollars in value is theft in the fifth degree. Theft in the fifth degree is a simple misdemeanor.

In this case, claimant admitted in a written statement that he committed a class "D" felony in connection with his employment. Benefits are denied and wage credits shall be deleted from all employers prior to the date of discharge on August 11, 2016.

DECISION:

The appeal is timely. The September 21, 2016, (reference 01) decision is affirmed. The claimant was discharged from employment due to job-related gross misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible, and wage credits shall be deleted from all employers prior to the date of discharge on August 11, 2016.

Christine A. Louis
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515)478-3528

Decision Dated and Mailed

cal/