

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CYNTHIA K HUSS

Claimant

APPEAL NO. 10A-UI-01112-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

**Original Claim: 12/06/09
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc. filed a timely appeal from a representative's decision dated January 5, 2010, reference 01, which held the claimant eligible to receive unemployment insurance benefits. After due notice was issued, a telephone conference hearing was scheduled for and held on February 17, 2010, in conjunction with Appeal No. 10A-UI-01113-NT. The claimant participated personally. Participating as a witness was Ronald Huss, the claimant's husband. The employer participated by Elizabeth Graeser, facility manager. Employer's Exhibits A and B were received into evidence.

ISSUE:

At issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Cynthia Huss was employed by Wal-Mart Stores most recently from April 16, 2008, until December 8, 2009, when she was discharged from employment. Ms. Huss worked as a full-time sales associate. Her immediate supervisor was Amber Blad.

The claimant was discharged after an investigation concluded the claimant had made a veiled threat of potential harm to another employee in violation of the company's workplace violence policy. Ms. Huss was aware of the policy and had acknowledged the receipt of the company handbook. Under the policy, employees who engage in harassment, violence, or threats of violence are subject to discharge from employment. Under its terms, the policy includes veiled threat of harm (See Exhibit A).

The claimant and another Wal-Mart associate had engaged in a dispute about the construction and purchase of a quilt unrelated to their employment at Wal-Mart. The dispute, however, soon escalated into the employment when the parties continued to engage in the dispute at work and other employees became aware of the dispute. The employer reasonably considered the

claimant's statement to her supervisor as a veiled threat of harm when Ms. Huss stated, "If something isn't done, someone is going to get hurt."

Ms. Huss was discharged after admitting that she had made that statement or one similar to it.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Cynthia Huss was discharged for misconduct in connection with her employment. It does.

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.

Because the claimant was discharged, the employer has the burden of proof in this matter. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa App. 1992).

The evidence in the record establishes the claimant was aware of the company's workplace violence policy and knew or should have known that veiled threats of violence would result in her termination from employment. The claimant's statement that "someone is going to get hurt" or "it will get physical" constitute veiled threats of violence.

Threats of violence in the workplace constitute misconduct that disqualifies the claimant for benefits. The employer need not wait until the employee acts upon the threat. See Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995).

The evidence in the record establishes that the claimant violated the employer's established policy regarding threats of violence in the workplace and was aware that conduct of that nature could result in her discharge from employment. Benefits are denied.

The claimant has received unemployment insurance benefits to which she is not entitled.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The issue of whether the claimant must repay the unemployment benefits she has received is remanded to the Unemployment Insurance Services Division for a determination.

DECISION:

The representative's decision dated January 5, 2010, reference 01, is reversed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefits amount, provided she is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits she has received is remanded to the Unemployment Insurance Services Division for a determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw