IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

Appeal Number:	**05A-UI-02811-JTT**
OC: 02/06/05	**R: 01**
Claimant: Respondent (2)	

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the *Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319*.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

BRIAN W LOHRENZ
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STATE CLEARLY
1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

WAL-MART STORES INC
^C/_O FRICK UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct
Section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

Wal-Mart filed a timely appeal from the March 7, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 5, 2005. Brian Lohrenz participated in the hearing. Art Cummings, Assistant Store Manager, represented Wal-Mart. Exhibits One through Six were received into evidence. The administrative law judge took official notice of the Agency's administrative records regarding benefits disbursed to Mr. Lohrenz.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Brian Lohrenz was employed by Wal-Mart as a full-time stockman from July 27, 2002 until February 1, 2005, when Assistant Store Manager Art Cummings discharged him for "loafing" in violation of written company policy. The policy is contained in the employee handbook. On July 23, 2002, Mr. Lohrenz executed a written acknowledgment that he had received, read and understood the policies set forth in the handbook.

The final incident that prompted Mr. Cummings to discharge Mr. Lohrenz occurred on January 30, 2005. Mr. Lohrenz had been working in the store parking lot retrieving shopping carts when a friend arrived for work at Wal-Mart. Mr. Lorenz's friend was off the clock, but Mr. Lorenz was on the clock. Mr. Lohrenz took an unauthorized ten-minute break to look at the friend's car and chat. One or more members of management observed the conversation and reported it to Mr. Cummings the next day. Pursuant to Wal-Mart policy regarding breaks, if Mr. Lohrenz felt he required a break, he was expected to let a manager know. In addition, the management made walkie-talkies available to the employees who worked outside so that they could communicate with management and other employees. Mr. Lohrenz had only been retrieving carts in the parking lot for approximately 30 minutes prior to taking the unauthorized break.

On February 1, Mr. Cummings summoned Mr. Lohrenz to his office to discuss the incident. Mr. Lohrenz admitted that he had taken the unauthorized ten-minute break. Mr. Cummings reviewed with Mr. Lohrenz that he had received prior reprimands and that under Wal-Mart's progressive discipline policy, Mr. Lohrenz's employment was being terminated.

Mr. Lohrenz received a reprimand on August 6, 2004 for taking an unauthorized break under similar circumstances. On August 4, a Wal-Mart manager observed Mr. Lohrenz standing in the parking lot visiting with a fellow stockman for over 10 minutes. At the time Mr. Lohrenz received that reprimand, he was warned that a further violation would result in termination of his employment. In addition, Mr. Lorenz was placed on a decision day, a day off to consider his future employment with Wal-Mart. Mr. Lohrenz acknowledged the violation. See Exhibit Four.

Mr. Lohrenz had been observed by management on other occasions sitting on top of carts in the parking lot, talking on his cell-phone, or standing next to the "cart corral" visiting with other stockmen, but had not received formal reprimands in connection with those events.

Mr. Lohrenz established a claim for benefits that was effective February 6, 2005 and has received benefits in the total amount of $695.00.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Lohrenz was discharged for misconduct in connection with his 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Since 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 is not necessarily serious enough to warrant a denial of unemployment 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 Ct. App. 1992).

The evidence in the record establishes that Mr. Lohrenz was discharged for negligence in the performance of his duties, specifically, for standing around talking to a friend when he was supposed to be collecting shopping carts in the parking lot. Mr. Lohrenz understood the rules regarding authorized and unauthorized breaks and the procedure for requesting a break. Mr. Lohrenz had received a serious reprimand in August 2004, at which time Wal-Mart management made him aware that they had observed Mr. Lohrenz neglecting his duties on multiple occasions. The prior reprimand had been for the exact same behavior that prompted the discharge. At the time of the prior reprimand, Mr. Lohrenz was specifically warned that the next violation would cost him his job. Mr. Lohrenz' negligence in the performance of his duties was sufficiently recurrent to show an intentional and substantial disregard of the Wal-Mart's interests and Mr. Lohrenz's duties and obligations to Wal-Mart. See 871 IAC 24.32(1)(a). The administrative law judge concludes that Mr. Lohrenz was discharged for misconduct. Accordingly, a disqualification will enter.

The next issue to be addressed concerns an overpayment of benefits.

Iowa Code Section 96.3-7 provides:

> 7. Recovery of overpayment of benefits. 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.

> 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.

The $695.00 in benefits Mr. Lohrenz has received constitutes an overpayment that Mr. Lohrenz will have to repay.

DECISION:

The Agency representative's decision dated March 7, 2005, reference 01, is reversed. The claimant was discharged for misconduct. The claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant is overpaid benefits of $695.00.

jt/kjf