

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEB J NICHOL
Claimant

APPEAL NO. 08A-UI-04435-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 04/06/08 R: 02
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc. (employer) appealed a representative's April 28, 2008 decision (reference 01) that concluded Deb J. Nichol (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 21, 2008. The claimant participated in the hearing and presented testimony from two other witnesses, Laura Smith and Corrine Fisher. Jodi Jensen appeared on the employer's behalf and presented testimony from one other witness, Nicole Greve. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on August 3, 2007. She worked full time as a people greeter in the employer's Marshalltown, Iowa, store. Her last day of work was February 21, 2008. The employer discharged her on that date. The reason asserted for the discharge was allegedly taking and consuming a pint bottle of milk without paying for it on March 2.

On March 2, the claimant was getting ready to have lunch in the employee lounge area when she saw her daughter, Ms. Smith, in the store getting ready to check out. Ms. Smith offered to buy the claimant a pint of milk for her lunch such as the one Ms. Smith already had in her cart. The clerk told the claimant that she would just scan the milk bottle twice and the claimant could just grab another bottle from the dairy cooler as she went back to the employee lounge, so the claimant did so. As Ms. Smith left the store, she saw and visited with Ms. Fisher, who was working as a people greeter; Ms. Fisher saw the sales receipt which showed the purchase of at least two bottles of milk.

Another employee saw the claimant take the bottle of milk from the dairy case and go back to the employee lounge with it, apparently not paying for it. That employee reported the matter to Ms. Greve, an assistant manager, who reported the matter to asset protection. Nothing was said to the claimant on the matter until February 21, at which time she was discharged because the sales receipt from February 2 had not been kept so she could not prove that the bottle of milk had been paid for.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is her alleged theft of the bottle of milk on February 2. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant's daughter had not paid for the bottle of milk as testified to by the claimant and her witnesses. Further, there is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). The incident in question occurred almost three weeks prior to the employer's discharge of the claimant.

The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's April 28, 2008 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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