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

CAROL A KISLING
1320 – 3RD ST NW
CEDAR RAPIDS IA 52405

WAL-MART STORES INC
C/O TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-02333-RT
OC: 01/15/06 R: 03
Claimant: Respondent (1)

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.

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.

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 of Benefits

STATEMENT OF THE CASE:

The employer, Wal-Mart Stores, Inc., filed a timely appeal from an unemployment insurance decision dated February 9, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Carol A. Kisling. After due notice was issued, a telephone hearing was held on March 15, 2006, with the claimant participating. Adrienne Kindhart, Assistant Manager at the employer's store in Cedar Rapids, Iowa, where the claimant was employed, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Employer's Exhibits One and Two were admitted into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One and Two, the administrative law judge finds: The claimant was employed by the employer, most recently as a full-time people greeter, from May 17, 1999, until she was discharged on January 13, 2006. The claimant was discharged for taking a 30 minute break instead of a 15 minute break on January 13, 2006 and because she would have received her fourth coaching or written warning which, according to the employer's policies, requires a discharge. On January 13, 2006, the claimant took a break from between 25 and 30 minutes when she was only entitled to a 15 minute break. The employer caught the claimant on videotape leaving her workstation at approximately 2:00 p.m. and returning at approximately 2:32 p.m. The claimant did take longer than 15 minutes for her break. The claimant honestly believed that the period of time spent walking to and from the break room was not included in her 15 minute break and then on the way back from her break she had to stop at the bathroom and therefore was delayed in getting back to her workstation. Occasionally when returning from a break the claimant also had to stop and help a customer but she was not sure whether she had done so on this occasion. Since this would have resulted in the claimant's fourth coaching or written warning she was discharged.

On September 11, 2004, the claimant received a verbal coaching for not "zoning" her department, meaning not cleaning it up and fixing it up. The claimant had just returned from being off work for one month because she had lost her husband and she was also ill. The claimant's mind was not completely on the job at that time. On October 7, 2004, the claimant received a written coaching for the same behavior. The claimant testified that she would often be very busy and would not be able to complete her "zoning." On February 24, 2005, the claimant received a decision-making day again because of "zoning" failures and in addition customer complaints. The claimant did not remember the customer complaints. These coachings appear at Employer's Exhibit Two. The employer's policies about its break time appears at Employer's Exhibit One. Pursuant to her claim for unemployment insurance benefits filed effective January 15, 2006, the claimant has received unemployment insurance benefits in the amount of $1,333.00 as follows: $250.00 per week for seven weeks, from benefit week ending January 28, 2006 to benefit week ending March 11, 2006; but of that amount $417.00 was offset against some of these benefits because of vacation pay. For benefit week ending January 21, 2006 the claimant received no earnings because she had vacation pay sufficient to cancel benefits for that week.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.

2. Whether the claimant is overpaid unemployment insurance benefits. She is not.

The parties agree, and the administrative law judge concludes, that the claimant was discharged on January 13, 2006. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a

preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witness, Adrienne Kindhart, Assistant Manager at the employer's store in Cedar Rapids, Iowa, where the claimant was employed, credibly testified that the claimant was discharged for taking a longer break than authorized on January 13, 2006 and further because this would have resulted in her fourth coaching and after four coachings one is discharged. The claimant concedes that she took longer than 15 minutes for her break which was the period of time established by the employer for a break. However, the claimant credibly testified that she believed that the time it took to get to and from the break room was excluded from the 15 minutes and further on the day in question that the claimant had to stop at the restroom and may even have had to deal with a customer on the way back to her workstation. The administrative law judge is constrained to conclude that the employer has not demonstrated by a preponderance of the evidence that the claimant was either willful or deliberate in taking a longer break. The claimant received three warnings including a verbal coaching on September 11, 2004; a written coaching on October 7, 2004; and a decision-making day on February 24, 2005. All three of these were performance matters including, for the last one, customer complaints. The primary failure of the claimant was in not completing "zoning" or cleaning up and fixing up the department. The claimant credibly testified that she had been off work for one month because she had lost her husband and was ill and her mind might not have been on the job. The claimant also credibly testified that often she would get very busy and would not have time to properly "zone" her department. The claimant credibly testified that she had no recollection of the customer complaint or the actions that gave rise to the alleged customer complaint. The administrative law judge is constrained to concluded that these warnings also do not demonstrate sufficient willful or deliberate behavior on the part of the claimant to establish disqualifying misconduct for those reasons. Accordingly, the administrative law judge concludes that there is not a preponderance of the evidence of any deliberate acts or omissions on the part of the claimant constituting a material breach of her duties and obligations arising out of her worker's contract of employment nor is there a preponderance of the evidence establishing any acts on the part of the claimant that evince a willful or wanton disregard of the employer's interests. Therefore, the claimant's behaviors giving rise to her discharge are not disqualifying misconduct for those reasons. The more difficult question here is whether the claimant's behavior is carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct.

The administrative law judge concludes that the claimant's behaviors here giving rise to her discharge do not rise to the level of recurring negligence. The claimant may well have been negligent on January 13, 2006 when she took too long for her break. However, the claimant had received no warnings for such behavior previously. The only warnings received by the claimant were for performance issues. Further, two of those warnings occurred over 15 months before the claimant's discharge. The administrative law judge is constrained to conclude that the warnings received by the claimant were for mere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity and are not disqualifying misconduct. Finally, the administrative law judge concludes that the long break on January 13, 2006, is not negligence in such a degree of recurrence as to establish disqualifying misconduct but at most was an isolated instance of negligence and is not disqualifying misconduct.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct, to support a disqualification from unemployment insurance benefits, must be substantial in nature. Fairfield Toyota, Inc. v.

Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

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.
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> 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 administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $1,333.00 since separating from the employer herein on or about January 13, 2006 and filing for such benefits effective January 15, 2006. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of February 9, 2006, reference 01, is affirmed. The claimant, Carol A. Kisling, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

cs/tjc