

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JULIE A MANN

Claimant

WAL-MART STORES INC

Employer

APPEAL NO: 10A-UI-03159-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/10/10

Claimant: Respondent (1)

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct

STATEMENT OF THE CASE:

The employer appealed a department decision dated February 10, 2010 reference 01, that held the claimant was not discharged for misconduct on January 13, 2010, and benefits are allowed. A telephone hearing was held on April 8, 2010. The claimant, and her mother, Marcia Berry, participated. Tonya Hilmer, Assistant Manager, and Mary Harris, Merchandise Supervisor, participated for the employer. Employer Exhibits 1, 2 & 3 were received as evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with employment.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began work on February 9, 2008, and last worked for the employer as a full-time sales associate in the Deli department on January 13, 2010. The claimant received the employer policies at the time of hire that included gross misconduct provisions. The grazing policy prohibits an employee from opening packages, purposefully damaging items, removing items from the shelf to eat, or any other act which causes a financial loss to the company.

On January 11, 2010 supervisor Harris observed the claimant taking some food items from the hot case, placing it on a paper towel, and handing it over to her son on the other side of the case. The claimant's son did not pay for the food items. The employer discharged the claimant on January 13 for a gross misconduct policy violation of grazing. The claimant did not believe she violated the policy by giving some "sample" food items for which customers are not required to pay in deciding whether to select an order.

Two days before discharge, the claimant had questioned the employer about an unauthorized schedule change. The claimant believes her discharge was an act of retaliation for questioning this matter.

REASONING AND CONCLUSIONS OF LAW:

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.

The administrative law judge concludes the employer has failed to establish that the claimant was discharged for misconduct in connection with employment on January 13, 2010.

The employer discharged the claimant for a single incident of giving some food to her son. While the claimant exercised poor judgment in likening her conduct to that of giving samples to customers who are testing food in deciding what to order, her conduct does not rise to the level of job disqualifying misconduct. The grazing policy does not specifically state that what the claimant did is a violation. The employer allows customers to sample food without paying for it, and the claimant's son was a customer on this occasion.

DECISION:

The department decision dated February 10, 2010 reference 01, is affirmed. The claimant was not discharged for misconduct on January 13, 2010. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs