

**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**

**ROSAANN BLANCHARD
315 THOMPSON ST
SHEFFIELD IA 50475**

**WAL-MART STORES INC
c/o THE FRICK COMPANY
PO BOX 283
ST LOUIS MO 63166-0283**

**MARK HUDSON
ATTORNEY AT LAW
BAIRD HOLM MCEASHAN
CHRIS HEDICAN
1500 WOODMAN TOWER
OMAHA NE 68102**

**Appeal Number: 04A-UI-05460-S2T
OC: 04/04/04 R: 02
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.

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 – Overpayment

STATEMENT OF THE CASE:

Wal-Mart Stores (employer) appealed a representative's May 3, 2004 decision (reference 03) that concluded RosaAnn Blanchard (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 28, 2004. The claimant participated personally. The employer was represented by Mark Hudson, Attorney at Law, and participated by Stan Schlicher, Assistant Manager and Shirley DeVries, Furniture Department Manager.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on September 10, 2002, as a part-time sales associate in the snack bar. The claimant received a copy of the employer's handbook and signed for its receipt on September 10, 2002. The claimant received verbal warnings for failure to wear gloves at all times, leaning on the snack counter and having personal items in her work area.

On December 31, 2003, the employer issued the claimant a written warning and decision-making day after a customer complained. The customer returned recently purchased popcorn to the claimant because it was unsatisfactory. The claimant emptied the returned popcorn into the bin of fresh popcorn, which was for sale. The claimant understood she could be terminated for further infractions.

On or about March 14, 2004, a customer asked the claimant for a shake, pizza, and water. The claimant turned her back on the customer for approximately seven minutes while she made popcorn. Then the claimant turned around and asked the customer if she still wanted a shake. The customer said she still wanted the shake. The claimant made the customer the shake. The customer said she still wanted her pizza and water. The claimant gave the customer all three items after an 18-minute wait.

Behind that customer was an elderly customer with a walker. He ordered coffee and asked for assistance in getting the coffee to his booth. The claimant slammed the cup of coffee down on the counter spilling part of its contents. The customer asked for a full cup and the claimant walked away. The first customer assisted the elderly customer in getting the coffee to his booth. The elderly customer had tears in his eyes.

The events were reported to the employer on March 25, 2004. The employer investigated and on April 2, 2004, terminated the claimant for failing to treat customers properly.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes she was.

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).

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Repeated failure to follow an employer's instructions in the performance of duties is misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employer has a right to expect employees to conduct themselves in a certain manner. The claimant disregarded the employer's right by failing to treat customers properly after having been warned. The claimant's disregard of the employer's interests is misconduct. As such, she is not eligible to receive unemployment insurance 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 claimant has received benefits in the amount of \$968.00 since filing her claim herein. Pursuant to this decision, those benefits now constitute an overpayment, which must be repaid.

DECISION:

The representative's May 3, 2004 decision (reference 03) is reversed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until she has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount provided she is otherwise eligible. The claimant is overpaid benefits in the amount of \$968.00.

bas/kjf