

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CAROL BERGMANN
Claimant

APPEAL NO. 10A-UI-03433-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

**Original Claim: 01-24-10
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 18, 2010, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on April 15, 2010. The claimant participated in the hearing. Justin Downs, Asset Protection Coordinator, participated in the hearing on behalf of the employer. Employer's Exhibit One was admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as full-time inventory control specialist for Wal-Mart from March 6, 2006 to January 30, 2010. She was discharged for theft of merchandise from the employer. On January 14, 2010, Asset Protection Coordinator Justin Downs was notified the claimant was witnessed exiting the sales floor and into the backroom without paying for a Jacks Frozen Pizza. After being informed of that situation, Mr. Downs researched the claimant's purchase history and reviewed its video surveillance from November 22, 2009 to January 26, 2010, and discovered more than 20 separate incidents where items were taken from the sales floor by the claimant and never purchased. On November 22, 2009, the claimant took a can of Pringles worth \$1.50; on November 24, 2009, she took a box of doughnuts worth \$3.00; on November 28, 2009, she took a can of Pringles worth \$1.50; on December 5, 2009, she took a package of string cheese worth \$0.25 and a box of doughnuts worth \$3.00; on December 6, 2009, she took a can of Pringles worth \$1.50; on December 8, 2009, she took a Jacks Pizza worth \$3.25; on December 19, 2009, she took a compact disc worth \$13.88 and a Totinos Pizza worth \$1.25; on December 20, 2009, she took a box of doughnuts worth \$3.00; on December 21, 2009, she took a Totinos Pizza worth \$1.25, one orange worth \$0.58 and an orange soda worth \$1.38; on December 22 and 23, 2009, she took Hormel Beef Tips worth \$1.98 on each day; on December 27, 2009, she took one magazine of undeterminable worth; on December 29, 2009, she took string cheese worth \$0.25 and one apple worth \$0.50; on

January 5, 2010, she took an orange Sunkist soda worth \$1.38; on January 16, 2010, she took a Jacks Pizza worth \$3.25; on January 17, 2010, she took Lays Stacks Potato Chips worth \$1.25 and one Oscar Meyer Lunchable worth \$1.56; on January 18 and 23, 2010, she took Jacks Pizzas worth \$3.25; on January 25, 2010, she took a package of string cheese worth \$0.25 and one box of Townhouse crackers worth \$2.77; and on January 26, 2010, she took a Jacks Pizza worth \$3.25, for a total of \$189.10. The employer's policy requires employees to purchase their items before leaving the sales floor because leaving the sales floor is considered passing the last point of sale, a term used in shoplifting apprehensions. When interviewed by Mr. Downs January 30, 2010, the claimant admitted taking the items. The employer asked her to write a written statement and then take a handheld scanner on the floor and scan the items she took and write the quantity of each item taken (Employer's Exhibit One). The claimant admitted taking at least \$189.10 in merchandise from the store without paying for it in her written statement and during her testimony (Employer's Exhibit One). The employer terminated the claimant's employment for theft January 30, 2010.

The claimant has claimed and received unemployment insurance benefits since her separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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 employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant admitted stealing at least \$189.10 worth of merchandise from the employer between November 22, 2009 and January 26, 2010, and that she knew it was wrong. Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The February 18, 2010, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/kjw