

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CYNTHIA S POPE

Claimant

APPEAL NO: 12A-UI-07049-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 05/13/12

Claimant: Respondent (2/R)

Section 96.5-2-a – Discharge

Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc. (employer) appealed a representative's June 4, 2012 decision (reference 01) that concluded Cynthia S. Pope (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 July 11, 2012. The claimant participated in the hearing and presented testimony from one other witness, Susan Davolt. Allan Rye appeared on the employer's behalf. 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?

OUTCOME:

Reversed. Benefits denied.

FINDINGS OF FACT:

The claimant started working for the employer on May 13, 1985. She worked full time as a claims associate at the employer's Mason City, Iowa store. Her last day of work was May 15, 2012. The employer discharged her on that date. The stated reason for the discharge was taking a customer's misplaced purchase for her own use.

The claimant was on a vacation leave from active work from April 30 through May 13. On May 1, she and a friend, Davolt, came to the store shopping. As they prepared to leave, they discovered a case of beer which another customer had left in a shopping cart. The employer's policies require that if an employee finds lost property on the premises, the employee is required to turn in the property to the employer. Davolt urged the claimant to take the beer rather than turn it in, and assisted her in doing so; the claimant did not insist that the beer be turned in. The beer was taken away in the claimant's vehicle and later was given to a third person.

The customer who had left the beer in the shopping cart came back later on May 1 and made a complaint to the employer that the beer had been taken. The employer viewed video surveillance of the parking lot and discovered that it was the claimant who had taken the beer. After she returned from vacation she was confronted about the incident on May 15; as a result of taking the beer rather than turning it in, the employer discharged the claimant.

The claimant established a claim for unemployment insurance benefits effective May 13, 2012. The claimant has received unemployment insurance benefits after the separation.

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); Iowa Code § 96.5-2-a.

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).

There is some suggestion that the claimant does not believe her conduct can be considered misconduct because it occurred while she was on vacation. Under the definition of misconduct for purposes of unemployment benefit disqualification, the conduct in question must be "work connected." *Diggs v. Employment Appeal Board*, 478 N.W.2d 432 (Iowa App. 1991). However, the court has concluded that some off-duty conduct can have the requisite element of work connection. *Kleidosty v. Employment Appeal Board*, 482 N.W.2d 416, 418 (Iowa 1992). Under similar definitions of misconduct, it has been found:

In order for an employer to show that its employee's off-duty activities rise to the level of misconduct in connection with the employment, the employer must show by a preponderance of the evidence:

[T]hat the employee's conduct (1) had some nexus with her work; (2) resulted in some harm to the employer's interest, and (3) was in fact conduct which was (a) violative of some code of behavior impliedly contracted between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer.

Dray v. Director, 930 S.W.2d 390 (Ark. App 1996); *In re Kotrba*, 418 N.W.2d 313 (SD 1988), quoting *Nelson v. Department of Employment Security*, 655 P.2d 242 (WA 1982); 76 Am. Jur. 2d, Unemployment Compensation §§77–78. Therefore, use of a controlled substance on an employee's own time can be work-connected misconduct where the employer's policies prohibit such illegal off-duty conduct and the employee is on notice of such policies. *Kleidosty*, supra. Similarly, here there is a nexus to the work: she was on her employer's premises. There was a harm to the employer's interest; its customer's property was taken. The conduct did violate the employer's policies regarding finding lost items, and the claimant knew or should have known that there could be some harm to the employer. Even if "finders, keepers," might be a valid argument if the beer had been found elsewhere, given that the beer was found on the premises of the claimant's employer, she knew or should have known that she still had an obligation to turn in the found item. The claimant's taking of the beer rather than turning it in shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

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 § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded the Claims Section.

DECISION:

The representative's June 4, 2012 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of May 15, 2012. This disqualification continues until the claimant has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css