

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TONY J GEHRIG
Claimant

APPEAL NO. 13A-UI-02555-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 01/13/13
Claimant: Respondent (2/R)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

Wal-Mart Stores filed a timely appeal from a representative's decision dated February 21, 2013, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on March 28, 2013. Claimant participated. The employer participated by Mr. Ronnie Reeves, Division Manager, Heating and Air Conditioning Service and Mr. Dave Hobey, Department Manager.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Tony Gehrig began employment with Wal-Mart Stores on February 21, 2005. Gehrig was employed as a full-time heating and air conditioning service technician and was paid by salary. His immediate supervisor was Dave Hobey.

Mr. Gehrig's employment with Wal-Mart Stores ended on January 16, 2013 when Mr. Gehrig reasonably concluded that he was to be discharged by the employer. Mr. Gehrig had been placed on a performance improvement plan that required him to contact a list of Wal-Mart stores and to begin preventive maintenance on a list of stores.

The claimant's direct supervisor and the district manager planned to meet with Mr. Gehrig on January 16, 2013 because the claimant was not providing updates of contact in preventive maintenance as required to his supervisor and because the claimant was not accepting calls from the supervisor and because a check with Wal-Mart Stores showed that Mr. Gehrig was not improving his communication nor making significant progress in the preventive maintenance expectations that had been given to him in the performance improvement plan. Mr. Gehrig had demonstrated the ability to adequately perform the duties of his job in the past and the employer had allowed sufficient time for Mr. Gehrig to be making improvements in his performance but the claimant had not done so.

REASONING AND CONCLUSIONS OF LAW:

The first question before the administrative law judge is whether the evidence in the record establishes the claimant quit employment or was discharged. The administrative law judge concludes based upon the evidence in the record that Mr. Gehrig was discharged from employment.

The next question becomes whether the employer has sustained its burden of proof in establishing disqualifying job misconduct. It has.

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 proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a finding of misconduct in connection with the work. The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

The evidence in the record establishes that Mr. Gehrig had the ability to perform his service duties as a service technician for Wal-Mart Stores but did not do so on a continuing basis. The employer followed a reasonable course of action by warning the claimant and placing him on a performance improvement plan. Based upon the claimant's skills and abilities and the list of expectations the employer was reasonable in believing that Mr. Gehrig could make significant progress in contacting a list of stores and by starting preventive maintenance on a list of stores

to be accomplished. When the claimant did not keep his supervisors updated as required and did not make any significant progress in the employer's reasonable expectations, the employer planned to discharge Mr. Gehrig from his employment. During the discharge meeting the claimant made statements that lead the employer to believe that the claimant's intention was to quit. The evidence in the record establishes that had the claimant not made those statements he would have in fact been discharged at that time.

The administrative law judge concludes based upon the evidence in the record that the employer has sustained the burden of proof in this matter. The claimant had the ability to do the job, he was given sufficient time to make progress but did not do so. Unemployment insurance benefits are withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

DECISION:

The representative's decision dated February 21, 2013, reference 01, is reversed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in

and been paid wages for insured work equal to ten times his weekly benefit amount, and is otherwise eligible. The issue of whether the claimant must repay unemployment insurance benefits will be remanded to the UIS division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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