

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

EDWARD A MCKENZIE
Claimant

APPEAL NO. 08A-UI-11697-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 10/05/08 R: 04
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated December 3, 2008, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice was issued, a telephone conference hearing was scheduled for and held on December 30, 2008. The claimant participated. The employer participated by Ray Scott, co-manager.

ISSUES:

The issues in this matter are whether the claimant was discharged for misconduct and whether the claimant is overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all the evidence in the record, finds: The claimant worked for this employer from March 25, 2008, until September 29, 2008, when he was discharged from employment. Mr. McKenzie held the position of overnight floor maintenance worker and was paid by the hour.

The claimant was discharged when it was determined that the claimant had repeatedly clocked in early without authorization and had not performed any services on behalf of the employer for approximately 20 minutes on each occasion. Mr. McKenzie had been on light-duty limitations and had not been given any work directives during the final hours of his overnight shifts. The claimant did not bring the matter to the attention of upper management but instead chose to clock in early without authorization to make up for what he considered to be time lost at the end of his work shift. During the time that the claimant had clocked in early without authorization, he occupied himself by performing non-work-related functions, utilizing the company's computer system at times. Because of the repetitive nature of the claimant's unauthorized clocking in and because he was not performing any services on behalf of the employer, the decision was made to discharge Mr. McKenzie from his employment rather than imposing a lesser form of discipline.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. McKenzie was discharged for intentional misconduct in connection with the employment.

The evidence in the record establishes that Mr. McKenzie was dissatisfied because he was not given specific directions as to what he should be doing during his final hour of employment on an overnight shift. The claimant had been on a light-duty assignment due to a work-related injury, but did not bring his dissatisfaction about lack of directives for his final hours of work to the attention of upper management. The claimant, it appears, clocked out instead of being unproductive during his final working hour from 7:00 a.m. until 8:00 a.m. without the permission or authorization of the employer. Mr. McKenzie then began clocking in early, but not performing any services on behalf of the employer for approximately 20 minutes each morning.

The administrative law judge concludes, based upon the totality of the hearing record, that the claimant knew or should have known that clocking in without authorization while performing no duties on behalf of the employer would be contrary to the employer's interests and standards of behavior and thus could lead to his discharge from employment.

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.

For the reasons stated herein, the administrative law judge concludes that the employer has sustained its burden of proof in showing that the claimant was discharged for misconduct in connection with his work. 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 December 3, 2008, reference 01, is reversed. The claimant was discharged for misconduct. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times the claimant's weekly benefit amount, provided he meets all other eligibility requirements of Iowa law. The administrative law judge remands the issue of overpayment to the Claims Division for a determination as to whether there has been an overpayment, the amount, and whether the claimant will have to repay those benefits.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw