

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PATRICIA COOPER

Claimant

APPEAL NO. 10A-UI-14423-D

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 09/05/10

Claimant: Respondent (1)

Section 96.5-2-a – Discharge
871 IAC 26.8(2) – Postponements

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc. (employer) appealed a representative's October 7, 2010 decision (reference 01) that concluded Patricia Cooper (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, an in-person hearing was held on February 8, 2011. The claimant failed to respond to the hearing notice and appear at the time and place set for the hearing, and therefore did not participate in the hearing. Travis Spahr appeared on the employer's behalf. During the hearing, Employer's Exhibits One through Five were entered into evidence. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for work-connected misconduct?

Should the hearing have been postponed?

FINDINGS OF FACT:

The claimant received the hearing notice prior to the February 8, 2011 hearing. The hearing was set for 1:00 p.m. that day. The claimant did not contact the Appeals Section to seek a postponement until the day of the hearing, at about 9:35 a.m. The reason the claimant sought the postponement was that she had started a new job the prior week and was scheduled to work at the time for the hearing.

The claimant started working for the employer on September 6, 2008. She worked part-time (25 – 30 hours per week) as a cashier at the employer's Windsor Heights, Iowa store. Her last day of work was September 4, 2010. The employer discharged her on that date. The reason asserted for the discharge was an integrity issue.

On July 28 the claimant had activated a gift card for \$10.00 that was not part of a customer transaction and for which no money or payment was deposited into her register. The employer became aware of this irregularity within a few days, and began to more closely monitor the claimant's transactions. The employer then found the claimant to have again activated a \$10.00 gift card on August 4 that was not part of a customer transaction and for which no money or payment was deposited into her register. On August 6 the employer discovered that the claimant had rung up a sale to herself, a violation in and of itself, and on that transaction had underrung the price on several items. In review, the employer discovered the claimant had also done this on July 22.

There were no other transactions found to be questionable after the August 6 transaction. The employer did not advise the claimant that she was under investigation until she was confronted on September 4. The employer discharged her at that time.

REASONING AND CONCLUSIONS OF LAW:

The first issue that must be addressed is whether the claimant's request for postponement of the hearing, effectively only three and a half hours prior to the scheduled hearing time, should have been granted. While reasonable requests for postponement can be granted, good cause must be shown, and at least absent extraordinary emergency situations, a request is to be made within three business days prior to the hearing. Iowa Code § 96.6-3; 871 IAC 26.8(2). The claimant did not request the postponement within three days prior to the hearing, and the reason for the request was not shown to be of such an emergency nature as would excuse a failure to have made a timely request for a postponement. The claimant's late request to postpone the hearing was properly denied.

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). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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 that 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 that 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).

The reason cited by the employer for discharging the claimant is her violation of the employer's integrity policies and expectations through the four transactions between July 22 and August 6. The claimant's actions were improper. However, there is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). The most recent incident in question occurred almost a month prior to the employer's discharge of the claimant, yet the employer did nothing to timely advise the claimant that there was a pending investigation that could lead to her discharge. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's October 7, 2010 decision (reference 01) is affirmed. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw