

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ALICE L DYER**

Claimant

**APPEAL NO. 08A-UI-04967-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**

Employer

**OC: 04/20/08 R: 02  
Claimant: Respondent (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

Iowa Code Section 96.3(7) – Recovery of Overpayment

**STATEMENT OF THE CASE:**

Wal-Mart Stores, Inc., filed a timely appeal from the May 13, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 17, 2008. Claimant Alice Dyer participated. Carl Fitzgerald represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant.

**ISSUES:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant has been overpaid benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Alice Dyer was employed by Wal-Mart Stores as a part-time product demonstrator from November 13, 2004 until March 8, 2008, when Store Manager Carl Fitzgerald discharged her. Ms. Dyer worked at the Sam's Club in Des Moines.

The final incident that prompted the discharge occurred on March 8. An asset protection officer observed Ms. Dyer take two books from the sales floor and placed them in her locker in the employee break room. Ms. Dyer was on a scheduled break at the time the asset protection officer observed her. The asset protection officer reported the matter to Store Manager Carl Fitzgerald. The asset protection officer reported that Ms. Dyer appeared to be making an effort to conceal the books. Ms. Dyer had picked up a third book upon returning from her break and had taken it to her product demonstration cart.

Mr. Fitzgerald summoned Ms. Dyer to a meeting. Mr. Fitzgerald asked Ms. Dyer about the books in her locker. Ms. Dyer said she had removed the books from the sales floor so that she could purchase them. Mr. Fitzgerald asked Ms. Dyer when she intended to purchase that books and Ms. Dyer said she intended to purchase the books that day. Upon further questioning,

Ms. Dyer indicated that she did not have any money that day and would not have any money for a few days.

The employer has a policy that prohibits employees from removing merchandise from the sales floor for personal use without first paying for the merchandise. The policy is covered during orientation and appears in the employee handbook. Ms. Dyer had received a copy of the policy at the start of her employment. The policy is also available to employees on the employer's computer system. Ms. Dyer was aware of the policy.

Mr. Fitzgerald told Ms. Dyer that because she had received other reprimands during the employment that he had to discharge her from the employment. The final incident followed a reprimand Ms. Dyer had received in December 2007 after she wrote two personal checks for merchandise without sufficient funds in her checking account to cover the checks. Ms. Dyer then took more than a month to reimburse the employer for the checks and associated fees.

Ms. Dyer established a claim for unemployment insurance benefits that was effective April 20, 2008 and has received \$1,421.00 in benefits.

### **REASONING AND CONCLUSIONS OF LAW:**

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 denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). 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. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The weight of the evidence in the record establishes, by a preponderance of the evidence, that Ms. Dyer knowingly violated the employer's established policy on March 8, when she concealed merchandise in her employee locker. The evidence indicates that Ms. Dyer's explanation of her actions to the employer evolved as she was speaking with Mr. Fitzgerald from an intention to pay for the books that day to an intention to pay for the books at some later date after Ms. Dyer admitted to not having money to pay for the books. The administrative law judge notes that Ms. Dyer's explanation of her conduct evolved from the time she spoke to Mr. Fitzgerald to the time she participated in the May 12, 2008 fact-finding interview. Though Ms. Dyer told the employer she had never engaged in similar conduct prior to March 10, Ms. Dyer told the fact-finder she had in fact engaged in prior similar conduct. The weight of the evidence does suggest an intent to use or consume the books without compensating the employer. The final incident occurred after the December incident(s) wherein Ms. Dyer bounced checks at the Sam's Club where she was employed. Ms. Dyer took more than a month to compensate the employer for the bad checks. This delay indicates a casual attitude toward the property rights of the employer.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Dyer was discharged for misconduct. Accordingly, Ms. Dyer is disqualified for benefits until 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 employer's account shall not be charged for benefits paid to Ms. Dyer.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because Ms. Dyer has received benefits for which she has been deemed ineligible, those benefits constitute an overpayment that Ms. Dyer must repay to Iowa Workforce Development. Ms. Dyer is overpaid \$1,421.00.

**DECISION:**

The Agency representative's May 13, 2008, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged. The claimant is overpaid \$1,421.00.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/css