

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STEPHANIE D QUINN

Claimant

APPEAL NO. 11A-UI-02537-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 01/23/11

Claimant: Respondent (2R)

Section 96.5-2-a – Discharge for Misconduct

Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated February 18, 2011, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on March 28, 2011. Employer participated by Elizabeth Graeser, store manager. Although the claimant provided a telephone number at which she could be reached, she did not answer the phone when called by the administrative law judge. No voice mail picked up and therefore no message could be left. The record consists of the testimony of Elizabeth Graeser.

ISSUE:

Whether the claimant was discharged for misconduct; and
Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness and having considered all of the evidence in the record, makes the following findings of fact:

The claimant was employed as a full-time sales associate in the meat department of the employer's store in Independence, Iowa. The claimant's last day of work was January 20, 2011. The claimant was terminated on January 21, 2011.

On January 15, 2011, the claimant told three supervisors that she wanted to hurt another associate. The claimant's language was very explicit. She said that she wanted to take a knife and gut the other employee and watch her die. The claimant was suspended. The claimant spoke to Elizabeth Graeser, the store manager, on January 20, 2011. She admitted to Ms. Graeser that she had these feelings about the other associate. Ms. Graeser terminated the claimant on January 21, 2011, due to her concern for the other associate's safety.

The employer has a zero tolerance for threats and violence in the workplace. Termination results if an employee violates this policy.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. All employers must provide a safe workplace and threats of violence must be taken seriously. An employer can reasonably expect that its employees will not threaten the safety of other workers. The employer has the burden of proof to establish misconduct.

The evidence is uncontroverted that the claimant made explicit threats of violence against another employee. The employer clearly had to terminate the claimant for safety reasons. What is difficult to determine, however, is why the claimant made these threats. The claimant told Ms. Graeser that she had no reason to harm the employee that she threatened and did not know why she did it. The claimant did not participate in the hearing and there was no opportunity for her to explain the threats or why she made them. This is significant because Ms. Graeser testified that the claimant had been off work due to mental health issues. Perhaps the threats were a manifestation of mental illness. However, this is purely speculation since

there was no evidence from the claimant or from any mental health care provider that might shed some light on this situation.

The administrative law judge concludes, therefore, that the claimant made a threat to harm another worker in violation of the employer's policy against violence in the work place. Misconduct has been established. Benefits are denied.

The next issue is overpayment of benefits.

Iowa Code § 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.

The overpayment issue is remanded to the claims section for determination.

DECISION:

The decision of the representative dated February 18, 2011, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. The overpayment issue is remanded to the claims section for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs