

IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS SECTION
1000 EAST GRAND—DES MOINES, IOWA 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

JESSICA E BURCH
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WAL-MART STORES INC
C/O FRICK UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-09317-SWT
OC: 07/25/04 R: 03
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a - Discharge
Section 96.6-2 - Timeliness of Protest

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated August 17, 2004, reference 03, that concluded it had failed to file a timely protest regarding the claimant's separation of employment and no disqualification from receiving unemployment insurance benefits could be imposed. A telephone hearing was held on September 20, 2004. Proper notice of the hearing was given to the parties. The claimant did not participate in the hearing. Gayle Woodard participated on behalf of the employer with witnesses, Sonya Jarvis and Marilyn Stout. Exhibit A-1 was admitted into evidence at the hearing.

FINDINGS OF FACT:

The claimant worked as a jewelry associate for the employer from September 2002 to August 25, 2003. The claimant was informed and understood that under the employer's work

rules, taking merchandise without paying for it was grounds for termination. In late August 2003, the claimant had film developed at Wal-Mart. She removed the photographs she wanted from the store without paying for them. When this was discovered, the employer discharged the claimant for theft on August 25, 2003.

The claimant filed a new claim for unemployment insurance benefits with an effective date of July 25, 2004. Her weekly benefit amount was determined to be \$60.00 per week. The claimant has satisfied any disqualification from her separation from the employer by earning wages of over \$600.00 in her employment since August 25, 2003.

A notice of claim was mailed to the employer's address of record on July 28, 2004, and was received by the employer on August 2, 2004. The notice of claim stated that any protest of the claim had to be faxed or postmarked by the due date of August 9, 2004. The employer's protest was faxed and mailed on August 9, 2004, but was not received until August 11, 2004, which was after the time period for protesting had expired.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer filed a timely protest of the claimant's claim for unemployment insurance benefits

Iowa Code section 96.6-2 provides in pertinent part:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant.

Part of the same section of the unemployment insurance law deals with the timeliness of an appeal from a representative's decision and states an appeal must be filed within ten days after the date the decision was mailed to the parties. In addressing an issue of timeliness of an appeal, the Iowa Supreme Court concluded that when a statute creates a right to appeal and limits the time for appealing, compliance with the time limit is mandatory and jurisdictional. Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979).

In this case, the employer filed its protest within the time period prescribed by Iowa Code section 96.6-2. The failure to receive the protest was due to an Agency error or delay or other action of the United States Postal Service, which under 871 IAC 24.35(2) excuses the delay in filing the protest. The employer's protest is deemed timely.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The claimant was discharged for work-connected misconduct but is not subject to disqualification because she had requalified by the time she applied for unemployment insurance benefits.

Iowa Code section 96.7-2-a(2) provides that the amount of benefits paid to an eligible individual shall be charged against the account of the employers in the base period in the inverse chronological order in which the employment of the individual occurred unless the individual has been discharged for work-connected misconduct or voluntarily quit employment without good cause attributable to the employer or refused suitable work without good cause.

Since the claimant was discharged for work-connected misconduct, the employer's account is exempt from charges for benefits paid to the claimant.

DECISION:

The unemployment insurance decision dated August 17, 2004, reference 03, is reversed. The employer filed a timely protest. The employer's account is exempt from charge for benefits paid to the claimant. The claimant requalified to receive benefits before filing her claim for unemployment insurance benefits.

saw/tjc