

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JASMIN FEJZIC**

Claimant

**APPEAL NO. 10A-UI-17056-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**

Employer

**OC: 10/17/10**

**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 December 2, 2010, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on January 25, 2011. Claimant participated. Employer participated by Sean Stewart, assistant manager, and Jennifer Nefzger, asset protection coordinator. The record consists of the testimony of Sean Stewart; the testimony of Jennifer Nefzger; the testimony of Jasmin Fejzic; and Employer's Exhibits 1-8. Tanja Abramovic served as Bosnian interpreter.

**ISSUE:**

Whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

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

The claimant worked at the employer's store located in West Des Moines, Iowa. He was hired on December 5, 2006, as an overnight stock person. On May 30, 2009, he transferred to the frozen dairy section as a day associate. He was a full-time employee. His last day of work was October 18, 2010. He was terminated on October 18, 2010, for what the employer deemed to be gross misconduct.

The events that led to the claimant's termination began when Jennifer Nefzger, the asset protection coordinator was conducting an investigation into some time card theft. During the course of her investigation, she discovered that the claimant was using his wife's hand held computer to mark down meat prices. His wife, Fatima, was a supervisor in the deli section. As a supervisor, she had the authority to mark down merchandise by 40% if that merchandise was set to expire. The claimant logged into the system using his wife's sign in and marked down meat products by 40%. He would then put this meat in a refrigerator and purchased the meat at the discounted price.

Ms. Nefzger conducted her investigation on October 6, 2010, and October 7, 2010. She reviewed surveillance footage of the claimant and compared this with reports that were generated showing what markdowns were made and when. The claimant's actions on the surveillance footage and the reports matched. She reported her findings to her supervisor. The claimant was then interviewed by another asset protection coordinator on October 18, 2009. The claimant admitted to having marked down the meat and he signed a restitution note. (Exhibit 6 and Exhibit 7) He agreed to repay the employer the sum of \$500.00. A Bosnian interpreter was present during this meeting.

The claimant's actions were a violation of the employer's written policy concerning associate purchase. (Exhibit 3) This policy had been given to the claimant on the first day of his orientation. (Exhibit 2)

#### **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. One of the most fundamental duties owed by an employee to the employer is honesty. An employer can reasonably expect that an employee will not misappropriate its property and will adhere to policies concerning purchase of products belonging to the employer. The employer has the burden of proof to establish misconduct.

The evidence established that the claimant did use his wife's computer to mark down meat and he then purchased the meat at the reduced price. The claimant's actions clearly violated the employer's written policies. The claimant admitted to having purchased the meat and agreed to repay the employer \$500.00 to make up the difference between the price he should have paid and the price he did pay.

The claimant testified that he was being singled out for this practice and that it was done in every other department. He also felt that other employees were permitted to get away with theft and were not terminated. The claimant provided no evidence to back up these assertions. It is difficult to believe that the employer would permit other employees to purchase products that had been improperly discounted if the employer knew about such purchases. The employer has written policies in place that specifically prohibit what the claimant admitted that he had done on ten different occasions. The employer has established misconduct. 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 December 2, 2010, 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.

---

Vicki L. Seeck  
Administrative Law Judge

---

Decision Dated and Mailed

vls/pjs