

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PENNY S STEPHENS

Claimant

APPEAL NO: 09A-UI-14522-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 08/24/08

Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Penny S. Stephens (claimant) appealed a representative's September 16, 2009 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Wal-Mart Stores, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 26, 2009. This appeal was consolidated for hearing with one related appeal, 09A-UI-14523-DT. The claimant participated in the hearing and presented testimony from one other witness, Dennis Stephens. The employer's representative received the hearing notice and responded sending the Appeals Section a statement that the employer was declining to participate in the hearing; therefore, the employer did not participate in the hearing. Based on the evidence, the arguments of the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working part time for the employer on or about September 1, 2006. As of about January 2007 she worked full time as a night stocker in the employer's West Burlington, Iowa store. Her last day of work was on or about August 18, 2008.

On or about August 12, 2008 the claimant was arrested and charged with trespassing, theft, and burglary. She immediately informed the employer about the charges; she was initially told she could work until the charges were resolved. On or about August 18 the store manager told the claimant she would be placed on a leave of absence until the charges were resolved.

The claimant established an unemployment insurance benefit year effective August 24, 2008. A notice of claim was sent to the employer on August 26, 2008, but the employer did not protest the claim, nor did the Agency treat the claim as a self-protest. The claimant received benefits, including emergency unemployment compensation benefits, throughout the benefit year, and the regular benefit charges were charged back against the employer's account with no protest.

from the employer. After the expiration of the claimant's regular benefit year as of August 23, 2009, she established a second benefit year. This claim year the Agency treated as a "self-protest" and proceeded to issue decisions on the separation for both the August 24, 2008 claim year and the August 23, 2009 claim year.

The criminal charges stemmed from the claimant and her husband walking along an area that had been damaged by the 2008 flood and then entering into a home that had been damaged and abandoned. The claimant was not on duty with the employer at the time. They were looking around because of being curious, but did not have permission to be on the property. They were arrested due to area problems with looting flood-damaged homes. The claimant denied that they took anything or were trying to take anything from the property. In about March 2009, the charges were resolved by the claimant pleading guilty to a simple misdemeanor charge of trespassing, as she lacked the resources to further fight the charges into a trial. When she reported this to the employer in approximately March 2009, the employer advised her that since she had not been acquitted of all charges but had pled guilty to some charge, she was discharged. No specifics were available as to what provision of the employer's policies the employer contended she had violated by her off-duty arrest and guilty plea.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge preliminarily notes that there was not a timely protest to the claimant's original August 24, 2008 claim filed pursuant to Iowa Code § 96.6-2. As a result, the non-disqualifying nature of the separation became final early in the August 24, 2008 claim year and should not have been subject to review when the subsequent claim year was established. See, Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979); Franklin v. IDJS, 277 N.W.2d 877 (Iowa 1979) and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990). However, despite this, the Agency did make a substantive determination on the separation, therefore, the administrative law judge will also make a substantive determination.

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 which 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 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. 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 arrest and eventual guilty plea to a charge for conduct which occurred while she was off-duty. Under the definition of misconduct for purposes of unemployment benefit disqualification, the conduct in question must be “work connected.” Diggs v. Employment Appeal Board, 478 N.W.2d 432 (Iowa App. 1991). However, the court has concluded that some off duty conduct can have the requisite element of work connection. Kleidosty v. Employment Appeal Board, 482 N.W.2d 416, 418 (Iowa 1992). Under similar definitions of misconduct, it has been found:

In order for an employer to show that is employee's off-duty activities rise to the level of misconduct in connection with the employment, the employer must show by a preponderance of the evidence:

[T]hat the employee's conduct (1) had some nexus with her work; (2) resulted in some harm to the employer's interest, and (3) was in fact conduct which was (a) violative of some code of behavior impliedly contracted between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer.

Dray v. Director, 930 S.W.2d 390 (Ark. App 1996); In re Kotrba, 418 N.W.2d 313 (SD 1988), quoting Nelson v. Department of Employment Security, 655 P.2d 242 (WA 1982); 76 Am. Jur. 2d, Unemployment Compensation §§ 77–78.

There has not been any showing of a connection with the claimant's work, a showing of harm to the employer's interests, or, critically, a showing of how the conduct violated a known policy of the employer so the claimant could or should have known that by entering the abandoned building she was jeopardizing the employer's interests. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not work-connected misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's September 16, 2009 decision (reference 01) is reversed. 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/css