

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LISA A COLE

Claimant

APPEAL NO. 14A-UI-04804-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 04/06/14

Claimant: Respondent (2R)

Section 96.5-2-a – Discharge

Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc. filed a timely appeal from a representative's decision dated April 29, 2014, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on May 28, 2014. Claimant participated. Participating as a witness for the claimant was Ms. Chelsey Cole, the claimant's spouse. The employer participated by Ms. Jessica Yost, Store Manager. Employer's Exhibits A, B, C, D and E and Claimant's Exhibits One, Two and Three were received into evidence.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits and whether the claimant has been overpaid job insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Lisa Cole was employed by Wal-Mart Stores, Inc. from February 2013 until April 6, 2014 when she was discharged from employment. Ms. Cole was employed as a full-time assistant store manager and was paid by salary. Her immediate supervisor was the store manager, Jessica Yost.

Ms. Cole was discharged on April 6, 2014 when the employer concluded that Ms. Cole had violated store policy by allowing her spouse, a non-employee, to perform work for Wal-Mart Stores off the clock, and without compensation on Friday, March 21, 2014. Company policy requires that all individuals performing services for the company be compensated for all work performed and that all work times be accurately recorded and reported to the company for payment. The company's Associate Pay Policy specifically prohibits all "off the clock work" and specifically prohibits the performing of any work without compensation. The policy prohibits supervisors and managers from requesting, requiring or permitting anyone to work without compensation. The policy instructs employees to report any violations of the rule to the company, so that the company can investigate the allegation.

The company policy states “off the clock work means any work performed when a non-exempt associate’s time was not recorded, either manually or by an electronic timekeeping device and the associate was not paid for the time worked.” Workers are required to clock in before they begin work and clock out when they are finished with work. Employees, who perform work off the clock, or without properly recording the time, are subject to disciplinary action up to and including termination. The company policy further provides that the company will investigate reported violations. The policy requires that all work must be reported to the company before the end of the next scheduled shift.

On Sunday, March 23, 2014, an employee, Jessica Stienbach, reported that on March 21, 2014 the claimant had allowed her spouse to work with her in the toy and electronic departments and stated that at least two other hourly employees had complained about the claimant allowing her spouse, who was not a Wal-Mart employee, to perform services for the company. Based upon the reported complaints Ms. Yost met with the claimant to discuss the matter. Ms. Yost explained the allegations and gave the claimant an opportunity to respond. Ms. Cole stated her spouse had come in on Friday night to pick her up from work while the claimant was working on setting up a modular. The claimant denied that her spouse had helped her work on the modular and stated that her spouse had sat on the floor and told the claimant where things went. When asked if her spouse was moving products or changing labels, Ms. Cole stated that she was not. When asked how long her spouse remained in the store, Ms. Cole responded that her spouse had been there about an hour. Ms. Cole was told that the matter would be investigated.

Subsequently the company reviewed the company’s security video tapes for March 21, 2014, and determined that the claimant’s spouse had been in the store for an extended period of time. The claimant’s spouse was observed moving deleted products, placing sale placards on products, straightening shelves and merchandise and placing new products on company shelves. Based upon the contents of the company’s security tapes, Ms. Yost concluded that the claimant had allowed an unauthorized individual to perform services for Wal-Mart for over a three-hour period on March 21, 2014 in violation of the company prohibition against anyone working off the clock. The store manager also concluded that Ms. Cole had not been truthful when she described her spouse’s activities or the time that her spouse had remained in the store that day. After review a decision was made to terminate Ms. Cole.

It is the claimant’s position that it is a “common practice” for employees to allow relatives to help them in the store. It is the claimant’s further position that on March 21, 2014 she was busy and when her spouse came to pick her up from work and that her spouse briefly assisted her handing the claimant labels as she assembled a modular. The claimant asserts that her spouse was merely “killing time” by straightening things up and she had only sporadic contact with her until the end of her work shift. Ms. Cole had observed others allowing their relatives to help them and did not think it a problem.

The claimant believes she was discharged by the store manager because of a complaint that she had filed about the store manager in the past.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

In discharge cases the employer has the burden of proof in establishing disqualifying misconduct. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee may not necessarily be 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).

In the case at hand, the store manager investigated allegations that Ms. Cole had allowed her wife to remain on store property for an extended period of time and allowed her to perform work for the company without being a company employee and without being compensation in violation of company policies. The employer followed a reasonable course of action by interviewing the claimant and obtaining a statement from Ms. Cole about her activities and the activities of her spouse on March 21, 2014. While Ms. Cole agreed that her spouse was present to pick her up from work that day, Ms. Cole maintained that her spouse did not perform any work for Wal-Mart Stores but merely handed her cards to be attached to a modular display. The claimant denied that her spouse engaged in several work activities that witnesses had reported to the company. Subsequently a review of the company's security tapes showed the

claimant's wife doing company work, moving merchandise, zoning and placing sales tags on merchandise. The security tapes also showed Chelsey Cole performing these activities for an extended period of time, that far exceeded the one-hour estimate that Ms. Cole had given to the store manager. Ms. Yost reasonably concluded that the claimant had violated the company's strict policy prohibiting off the clock work and concluded that Ms. Cole had not been truthful about her spouse's activities when questioned by the store manager.

The administrative law judge concludes that the claimant knew or should have known that allowing her spouse to remain on Wal-Mart property for an extended period of time while performing work-like activities without being a Wal-Mart employee or being compensated for work would put the company at risk, and was a violation of policy. The administrative law judge also concludes that the claimant was not truthful in describing her spouse's conduct to the store manager during the inquiry. Although the administrative law judge is mindful that the claimant believes that a previous complaint that she had made about the store manager caused her termination, the administrative law judge concludes that the evidence establishes that Ms. Cole's conduct on March 21, 2014 was disqualifying misconduct. For these reasons unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured equal to ten times her weekly benefit amount and is otherwise eligible.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. The administrative record reflects that the claimant has received unemployment insurance benefits in the amount of \$3,264.00 since filing a claim with an effective date of April 6, 2014 for the weeks ending April 19, 2014 through June 7, 2014.

Iowa Code section 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.

871 IAC 24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant.

Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)“b” as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying benefits were paid to which she was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who received benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based upon a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits if it is determined they did participate in the fact-finding interview. Iowa Code section 96.3(7). In this case the claimant has received benefits but was not eligible for those benefits. The issue of whether the employer participated in the fact finding is remanded to the Claims Division to determine whether the claimant is obligated to repay the Agency the benefits she received or the employer's account shall be charged.

DECISION:

The unemployment insurance decision dated April 29, 2014, reference 01, is reversed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount and is otherwise eligible. The claimant is overpaid unemployment insurance benefits in the amount of \$3,264.00. The issue of whether the claimant must repay the overpayment or the employer shall be charged is remanded to the Claims Division to determine if the employer participated in the fact finding in this matter.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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