

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ABDELSALAM I ALI
Claimant

APPEAL NO. 13A-UI-00512-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 11/11/12
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

Wal-Mart Stores filed a timely appeal from a representative's decision dated January 4, 2013, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on February 14, 2013. Mr. Ali participated personally. The employer participated by Mr. Eric Acker, Loss Prevention Worker and Ms. Jennifer Coder, Personnel Coordinator.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment benefits.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: The claimant was employed by Wal-Mart Stores from March 5, 2012 until October 22, 2012 when he was discharged for misappropriation of company property. Mr. Ali was employed as a full-time overnight maintenance worker and paid by the hour. His immediate supervisor was Robert Correll.

Mr. Ali was discharged after review of company security tapes showed Mr. Ali placing watermelon and other items that were the property of Wal-Mart Stores into sacks or a backpack and leaving the company premises without making payment for the items. The investigation began after another employee had reported to the company their belief that Mr. Ali was taking watermelon from the company. A review of security tapes for an extended period of time showed four separate instances during which Mr. Ali could clearly be observed taking company property of Wal-Mart placing items in sacks and leaving without payment.

When employees are hired they are specifically given training on the company's integrity expectations. The training includes the prohibition against taking or using any items without payment.

After the surveillance tapes were monitored for an extended period of time to determine the amount of pilferage that the claimant was engaging in, Mr. Ali was called to a meeting on October 22, 2012. At that time the claimant made admissions to taking watermelons, soda and gum of total value of approximately \$26.00. Mr. Ali offered to make restitution. Because his conduct was considered to be misappropriation of company property he was discharged from employment.

It is the claimant's position that the items that he was observed taking were limited to watermelon that was going to be otherwise discarded and that his purpose was only to share the watermelon with other associates or to eat it himself because he distained the concept of throwing away good food. The claimant denies making any admissions as to taking company property and contends that his taking of the food items was caused in part by "depression" and his need to eat food at times when he was hungry because of medications being taken for his medical condition.

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.

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. 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 this matter the evidence in the record establishes that the claimant was observed on company security tapes taking watermelon and another item from the company. The evidence also establishes that the subject of misappropriation or the taking of items even if discarded was covered in training and employees are specifically told that no item is to be taken or eaten or utilized without payment for the item and the failure to follow that required procedure can result in disciplinary action. When the claimant was questioned about the matter personally the evidence reflects that Mr. Ali admitted taking the watermelon and additionally admitted to taking soda and gum. These items were not of the nature of spoiled items that were to be discarded and the administrative law judge notes that the evidence in the record establishes that Mr. Ali was observed not taking the watermelon to a break area where it could be shared but secreting the items into sacks or a backpack and leaving the premises with the property.

For these reasons the administrative law judge concludes that the claimant's acts were intentional and the claimant's purpose was to remove the items without detection. Because the claimant's conduct was intentional and in violation of a reasonable and known company policy, the administrative law judge concludes that the claimant's discharge took place under disqualifying conditions. Unemployment insurance benefits are therefore withheld.

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.

DECISION:

The representative's decision dated January 4, 2013, 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 his weekly benefit amount and is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to the UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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