

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DYLAN R PEREZ

Claimant

APPEAL NO. 11A-UI-00611-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 12/12/10

Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge

Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated January 5, 2011, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on February 21, 2011. The parties were properly notified about the hearing. The claimant participated in the hearing with his representative, John Wolfe. Jerry Hill participated in the hearing on behalf of the employer.

ISSUES:

Was the claimant discharged for work-connected misconduct?

Was the claimant overpaid unemployment insurance benefits?

FINDINGS OF FACT:

The claimant worked as a cashier for the employer from August 2008 to November 28, 2010. He was informed and understood that under the employer's work rules, misappropriation of money was grounds for discharge.

On September 17, September 18, and November 21, 2010, the claimant took money from the cash register and put it in his pockets to keep. This was discovered after the employer determined there was a \$1,000.00 shortage from the cash register at the end of the day on November 21. This was reported to the asset protection department on November 22. The asset protection coordinator, Jerry Hill, then reviewed surveillance video from November 21 and saw the claimant take money from the register and put it in his pocket. There were reported shortages of \$50.00 on both September 17 and 18 as well, so surveillance video from those dates was reviewed as well. On the video for these days, the claimant is seen taking money from the register and putting the money in his pocket.

As part of the investigation, the claimant was interviewed. During the interview, the claimant denied taking any money. After completing the investigation, the employer discharged the claimant on November 28, 2010, for theft. The claimant has been charged criminally with theft in the second degree. The charges have not been resolved yet.

The claimant filed for and received unemployment insurance benefits for the weeks between December 12, 2010, and February 19, 2011.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing of the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. The employer has the burden of proof, but the standard of proof is the preponderance of the evidence. Under the Iowa Administrative Procedures Act, a finding may be based on evidence not admissible in a jury trial, provided it is the type of evidence reasonably prudent persons rely on to conduct serious affairs. Iowa Code § 17A-14-1. Consequently, while personally reviewing the video would have created greater certainty, Hill's testimony was credible and it is highly unlikely the employer would have taken the action it did without proof of the claimant's taking money from the store. The claimant's general denial of taking money does not overcome this credible testimony.

The claimant's conduct was a willful and material breach of the duties and obligations to the employer and a substantial disregard of the standards of behavior the employer had the right to expect of the claimant. Work-connected misconduct as defined by the unemployment insurance law has been established in this case.

The unemployment insurance law requires benefits to be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. But the overpayment will not be recovered when an initial determination to award benefits is reversed on appeal 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 whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of deciding the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded to the Agency.

Finally, the law provides for an enhanced disqualification for persons discharged for gross misconduct, which involves a written admission or conviction of an indictable offense. Iowa Code § 96.5-2-b & c. This was not listed as an issue and would not be appropriate to decide but the parties are alerted to the fact that under this law, "determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim."

DECISION:

The unemployment insurance decision dated January 5, 2011, reference 01, is reversed. The claimant is disqualified from receiving unemployment insurance benefits until he has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The matter of deciding the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded to the Agency.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/css