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

KELLY J PATTERSON
Claimant

APPEAL NO. 10A-UI-12234-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

**OC: 07/25/10
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 August 19, 2010, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on October 18, 2010. The parties were properly notified about the hearing. The claimant participated in the hearing. Linda Kraber 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 14, 2007, to July 7, 2010. She was informed and understood that under the employer's work rules, taking merchandise without paying for it was prohibited.

On June 25, 2010, the employer began investigating a 20-dollar cash shortage from the claimant's register. As part of the investigation, the asset protection coordinator conducted a review of surveillance video from May through July 3, 2010, which disclosed several instances where the claimant had taken merchandise from the store without paying for it.

The claimant was interviewed about the stolen merchandises, and she admitted orally and in writing to having taken merchandise without paying for it for more than a year.

The employer discharged the claimant on July 7, 2010, for theft of merchandise. The claimant has been charged with an aggravated misdemeanor of theft. The charges have not been resolved.

The claimant filed for and received a total of $3,150.00 in unemployment insurance benefits for the weeks between July 25 and October 30, 2010.

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. I do not believe the claimant's denial of taking merchandise without paying for it or her explanation was to why she would admit to theft when she had not committed the offense. The fact that the claimant has not been convicted does not prevent me from deciding for the purpose of this unemployment insurance case what has been proven to have happened by the preponderance of the evidence.

The claimant's violation of a known work rule 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 employer alleged the claimant committed gross misconduct, which provides an enhanced disqualification. This issue is not decided as it was not listed as an issue on the hearing notice. The gross misconduct disqualification requires a conviction of indictable offense or a written statement admitting to the commission of an indictable offense. An employer has five years to protest a claimant based on gross misconduct. Iowa Code § 96.5-2-b. The claimant is already disqualified for misconduct, but if the employer wishes to raise the gross misconduct issue, it must file a protest with the Agency on that basis and supply the necessary information to show grounds for a gross misconduct disqualification.

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.

DECISION:

The unemployment insurance decision dated August 19, 2010, reference 01, is reversed. The claimant is disqualified from receiving unemployment insurance benefits until she has been paid wages for insured work equal to ten times her weekly benefit amount, provided she 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.

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Steven A. Wise
Administrative Law Judge

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Decision Dated and Mailed

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