IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOSHUA P MYERS
Claimant

WAL-MART STORES INC
Employer

APPEAL NO. 09A-UI-00088-DWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/30/08 R: 03
Claimant: Respondent (1)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc. (employer) appealed a representative's December 26, 2008 decision (reference 01) that concluded Joshua P. Myers (claimant) was qualified to receive benefits, and the employer's account was subject to charge because the claimant had been discharged for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 15, 2009. The claimant participated in the hearing. The employer failed to respond to the hearing notice by contacting the Appeals Section prior to the hearing and providing the phone number at which the employer's representative/witness could be contacted to participate in the hearing. As a result, no one represented the employer.

After the claimant had been excused, the employer's witness contacted the Appeals Section to participate in the hearing. The witness did not have a control number. Since the employer is represented by TALX, the witness was going to contact the TALX representative to see if the representative had a control number, because the employer wanted the hearing reopened. Based on the employer's request to reopen the hearing, the administrative record, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Is there good cause to reopen the hearing?

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on October 7, 1998. The claimant worked as a full-time associate.

On December 4, 2008, a customer used a self-checkout register and forgot to pick up $70.00 in change. About ten minutes after this customer left, the claimant used the same register to check out items with his family. The claimant was not working. The claimant used a debit card

and did not request any money back. The claimant, however, noticed the cash in the cash return slot and picked it up. The claimant did not count the money, but put it in the Salvation Army Kettle as he left the store.

After the employer learned a customer had not picked up his $70.00, the employer reviewed the electronic transactions and the video tape of the transactions at that register. The employer talked to the claimant later on December 4. The claimant immediately acknowledged he took the cash in the cash return slot. The claimant also acknowledged he made a mistake by picking up the money and offered to give the employer $70.00. The employer discharged the claimant on December 4, for theft.

When the employer contacted the Appeals Section to participate in the hearing, the claimant had already been excused. The employer's witness relied on a TALX representative to phone the Appeals Section prior to the hearing to inform the Appeals Section what phone number and who to contact for the hearing. The employer's witness did not have a control number and was going to contact the TALX representative to find out if the representative followed the hearing instructions. The employer did not contact the Appeals Section again on January 15 to provide a control number.

REASONING AND CONCLUSIONS OF LAW:

If a party responds to a hearing notice after the record has been closed and the party who participated at the hearing is no longer on the line, the administrative law judge can only ask why the party responded late to the hearing notice. If the party establishes good cause for responding late, the hearing shall be reopened. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. 871 IAC 26.14(7)(b) and (c).

The facts do not establish that the employer's representative read or followed the hearing instructions by calling the Appeals Section prior to the hearing to provide the name of the employer's witness and the phone number at which he could be contacted. If the employer's representative had done this, the employer would have a control number to verify this took place. As a result, the employer did not establish good cause to reopen the hearing.

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence

or ordinary negligence in isolated incidents, or good-faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

As an employee, the claimant should have turned the $70.00 he discovered in the cash return slot to customer service. Instead, he took the money and put all the money in a Salvation Army kettle. There is no indication the claimant's job was in jeopardy prior to this incident. The claimant used poor judgment when he did not turn in the money, but under the facts of this case this error does not rise to the level of work-connected misconduct. As of November 30, 2008, the claimant is qualified to receive benefits.

DECISION:

The employer's request to reopen the hearing is denied. The representative's December 26, 2008 decision (reference 01) is affirmed. The employer had business reasons for discharging the claimant. These reasons do not constitute work-connected misconduct. As of November 30, 2008, the claimant is qualified to receive benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

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Debra L. Wise
Administrative Law Judge

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Decision Dated and Mailed

dlw/kjw