IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

LOLITA T OAKLEY
1440 E GRAND AVE APT 202
DES MOINES IA 50316-3854

WAL-MART STORES INC
C/O TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-02061-RT
OC: 01/22/06 R: 02
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Wal-Mart Stores, Inc., filed a timely appeal from an unemployment insurance decision dated February 9, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Lolita T. Oakley. After due notice was issued, a telephone hearing was held on March 9, 2006, with the claimant participating. Matthew Meyer, Co-Manager of the employer's store in Des Moines, Iowa, where the claimant was employed, participated in the hearing for the employer. Employer's Exhibits One through Four were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

When the administrative law judge began the hearing at 9:06 a.m. on March 9, 2006, the claimant had not called in a telephone number where she could be reached for the hearing. The claimant called the Appeals Section at 9:18 a.m. and provided a telephone number which the administrative law judge called at 9:19 a.m. and the claimant participated in the balance of the hearing.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One through Four, the administrative law judge finds: The claimant was employed by the employer as a full-time cashier from August 1, 2001, until she was discharged on January 26, 2006. The claimant was discharged for a cash shortage of $834.02 in her cash register on December 26, 2005. When a cashier begins her shift she takes a bag and signs it out from the accounting office. The bag contains $200.00 in cash. The cashier then goes to her computer (cash register) and places the money in the computer using his or her own password. No one else is to use the computer. At various times during the day employees from the accounting office will come by and take withdrawals from the cash drawer of the computer but will not tell the cashier the amount of the withdrawals. At the end of the shift the cashier puts all of the money and checks back in the bag and returns it to the accounting office. The claimant used to count down her drawer, at least counting the big bills, but the employer stopped this process. The claimant does not actually know if she was short the $834.02 as alleged by the employer. The employer was unable to identify or account for the cash shortage. The employer does not accuse the claimant of stealing or taking that money. The employer has cash handling policies as shown at Employer's Exhibit Four.

The claimant received a verbal warning on November 22, 2003 for writing checks to the employer that were returned insufficient funds or that "bounced." The claimant then received a written warning on July 27, 2004 and a decision-making day on April 22, 2005, both for attendance. These warnings appear at Employer's Exhibit One. The claimant's cash shortage on December 26, 2005 appears at Employer's Exhibit Two. Statements by other employees who were present at the time the claimant was questioned appear at Employer's Exhibit Three. It appears that the claimant was discharged primarily for having too many warnings or what the employer called coachings for improvement. The claimant had only been short small amounts in the past; on one occasion $20.00 and on another occasion $3.00 but she had not received any warnings for these. When the claimant was discharged she was informed that she could reapply for employment with the employer in six months. Pursuant to her claim for unemployment insurance benefits filed effective January 22, 2006, the claimant has received unemployment insurance benefits in the amount of $440.00 as follows: zero benefits for two weeks, benefit weeks ending January 28, 2006 and February 4, 2006, because of earnings and vacation pay; and $220.00 per week for two weeks from benefit week ending February 11, 2006 to benefit week ending February 18, 2006.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.

2. Whether the claimant is overpaid unemployment insurance benefits. She is not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The parties agree, and the administrative law judge concludes, that the claimant was discharged on January 26, 2006. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witness, Matthew Meyer, Co-Manager of the employer's store in Des Moines, Iowa, where the claimant was employed, credibly testified that the claimant was discharged for a cash shortage on December 26, 2005 in the amount of $834.02. Mr. Meyer knew of no other cash shortages for the claimant. The claimant credibly testified that she had two other cash shortages in very small amounts; one for $3.00 and another for $20.00 but that she received no warnings. Mr. Meyer credibly testified that the employer is not accusing the claimant of stealing the money. The only reason for the claimant's discharge was the cash shortage and the prior warnings or coachings for improvement received by the claimant. The claimant received a

verbal warning or coaching for improvement on November 22, 2003 for checks that she wrote being returned insufficient funds or being "bounced." The claimant then received a written coaching for improvement on July 27, 2004 and then a decision-making day on April 22, 2005, both for attendance. These warnings appear at Employer's Exhibit One.

On the record here, the administrative law judge is constrained to conclude that there is not a preponderance of the evidence that the claimant committed any acts that were deliberate acts or omissions constituting a material breach of her duties and obligations arising out of her worker's contract of employment or that evinced a willful or wanton disregard of the employer's interest or that were carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct The administrative law judge specifically notes that the claimant had never received any warnings or coachings for improvement for cash shortages or for violating the employer's cash handling policies. The claimant also credibly testified, and Mr. Meyer confirmed, that other employees come by and take withdrawals from the cash registers of the cashiers without informing the cashiers of the amount and that the employer has also discontinued the practice of having the cashiers count down their own cash drawers. The employer is not accusing the claimant of the theft of the money nor was the employer able to account for the cash shortage. The administrative law judge does note the significant amount of the cash shortage but must conclude here that there is not a preponderance of the evidence that the claimant was at fault for the cash shortage. At most, the claimant was negligent or careless in handling the money on that occasion but the administrative law judge concludes that it was an isolated instance of ordinary negligence and it is not disqualifying misconduct. The claimant had never received any warnings or disciplines for cash handling or cash shortages. It is true that the claimant had received three prior warnings, one in 2003 for writing checks to the employer that bounced, but this is too remote in time to be relevant here. Further, the claimant received a written coaching for improvement and a decision-making day for attendance but the administrative law judge concludes that those are too remote in similarity to be relevant here. It may be that the employer provides for a discharge upon a fourth violation of the employer's rules after a decision-making day but that is not the question here. The question here is whether the claimant's acts were willful or deliberate or recurring negligence. The administrative law judge is constrained to conclude that they were not.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

Iowa Code section 96.3-7 provides:

> 7. Recovery of overpayment of benefits. 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.

> 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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $440.00 since separating from the employer herein on or about January 26, 2006 and filing for such benefits effective January 22, 2006. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of February 9, 2006, reference 01, is affirmed. The claimant, Lolita T. Oakley, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

cs/tjc